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No.

In the

Supreme Court of the United States

October Term, 1998

ROBERT VALDESPINO; BRENDA ROLON,

Petitioners,

v

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a case under Section 2 of the Voting Rights Act, 42 U.S.C. §1973, are Hispanic Plaintiffs limited to producing **only** a single-member district containing a majority of Hispanic voting age citizens, to the exclusion of all other evidence, to show the "geographic insularity" requirement of *Thornburg v. Gingles?*

2. Under Section 2 of the Voting Rights Act, must a Defendant show more than that changes have occurred since the decennial census before being allowed to supplant that population data with invalid population information in order to defeat a plaintiff's voting rights claim?

LIST OF PARTIES TO THE PROCEEDING

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The opinion of the Court of Appeals is reported at 168 F.3rd 848 (5th Cir. 1999), and is included in the Appendix hereto at App. 1a. The opinion and judgment of the district court were issued on February 3, 1998 and are reprinted at App. 19a.

JURISDICTION

The Court of Appeals entered its judgment on March 11, 1999. This petition for writ of certiorari is filed within 90 days of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is reprinted at App. 34a.

STATEMENT OF THE CASE

Petitioners (Plaintiffs below) are Hispanic residents, citizens, and voters of the Alamo Heights Independent School District, ("Alamo Heights I.S.D."). Petitioners contend that the at-large election system used to elect trustees to the Alamo Heights I.S.D. dilutes Hispanic voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Respondent, the Alamo Heights I.S.D., is a school district organized under the laws of the State of Texas.

Alamo Heights I.S.D. has a population of about 25,000 persons according to the 1990 census. (P-24). Hispanics make up over 18% of the population, 17% of the voting age

population and about 24% of the student body. (P. 11 & 24). According to the 1990 census, the Alamo Heights I.S.D. lost population between 1980 and 1990. (P. 37). However, between 1980 and 1990 the Hispanic population of the Alamo Heights I.S.D. increased by over 28%. *Id.* According to the 1990 census, eighty-nine percent of the voting-age Hispanics are citizens eligible to vote. (App. 24a).

The Alamo Heights I.S.D. is governed by a seven member board of trustees. (R. Vol. 2, p. 341). All of the trustees are elected in a nonpartisan at-large, by place, majority vote election system to staggered three year terms. (R. Vol. 4, pp. 185-186). There is no subdistrict residency requirement nor is single shot voting allowed. *Id.* The Alamo Heights I.S.D. uses only one polling place for elections. (R. Vol. 4, p. 187).

A. *The Decision of the District Court.* Trial in this cause was held from September 15 through September 19, 1997. (App. 19a-20a). On February 3, 1998, the district court entered an order and judgment in favor of defendants. (App. 19a). In applying *Thornburg v. Gingles,* 478 U. S. 30, 50-1 (1986), the district court set aside 1990 census data and relied upon Respondents' estimates of population. Then, the Court found that Petitioners failed to establish the first element of the *Gingles* threshold factors. (App. 28a). The district court's determination was premised on its holding that Petitioners did not show that it is possible to draw a district in the Alamo Heights I.S.D. with a majority of Hispanic **citizen** voting age population when census data was adjusted for demographic changes since the 1990 census. (App. 28a)

The districting plans submitted by Petitioners contained a district with majority Hispanic population, majority Hispanic voting age population, and **majority Hispanic citizen voting age population according to the 1990 census**. (App. 24a).

The undisputed record also showed that single member districts in adjoining jurisdictions with smaller Hispanic concentrations had elected Hispanic representatives. (R. Vol. 7, pp. 639-640). Relying, not on the presumptively accurate 1990 census, but rather on the admittedly wrong population projections submitted by the Alamo Heights I.S.D., the district court held that Petitioners' evidence did not, as a matter of law, satisfy the first prong of *Gingles*. In so doing, the district court applied a "bright-line" test based on the proposition that only by establishing that the putative district contained a majority of Hispanic citizen voting age population, according to Respondents' 1997 estimate of population, could Petitioners meet the *Gingles* threshold requirement. (App. 27a-28a).

B. *The Opinion of the Court of Appeals.* The Court of Appeals affirmed, holding that: "Given that the Supreme Court has avoided the issue of what population to use for the first *Gingles* factor, and that other circuits have used the same approach as *Campos*, the district court used the correct legal test." (App. 10a). In rejecting Petitioners' argument that a more flexible standard of requiring a showing that Hispanics would comprise a sufficient majority in a proposed district to have the potential to elect candidates of their choice, the Court of Appeals determined that, "All of these complaints are baseless. In reality, this court has interpreted the *Gingles* factors as a bright line test." (App. 8a). Finally, the Court of Appeals determined that the abandonment of the decennial census, for admittedly erroneous population projections, was not clear error. (App. 12a).

REASONS FOR GRANTING THE WRIT

This case presents substantial questions involving the application of Section 2 of the Voting Rights Act and the meaning of the first *Gingles* threshold element. First, the rules

applied by the Fifth Circuit on this issue are new. Neither the Fifth Circuit, nor most of the other Courts of Appeals have previously applied such a rigid standard to the first *Gingles* precondition. The new rule of the Fifth Circuit forecloses any Section 2 cause of action, even when politically cohesive Hispanic citizens can establish that a challenged election system dilutes their voting strength and further when a feasible electoral alternative to the challenged structure is possible. Second, the new rule of the Fifth Circuit conflicts with the decisions of this Court and those of other Circuit Courts. Third, the new rule of the Fifth Circuit is also inconsistent with the intent of Congress in its enactment of the amendments to Section 2 of the Voting Rights Act in 1982. Fourth, allowing substitution of admittedly wrong and inconsistent population projections for the decennial census is contrary to standards set by this Court.

I. The New Rule Established by the Decision Below for Evaluating Plaintiffs' Evidence on the *Gingles I* Threshold Factor Forecloses Section 2 Challenges in an Important Class of Cases.

The Court of Appeals, addressing the first *Gingles* issue (Is the minority group large and compact enough to form a single member district?), ruled that this test could only be met by producing a district in which Hispanics comprise a majority of the citizen voting age population of the district. (App. 9a-10a). The Court of Appeals held that, "Given that the Supreme Court has avoided the issue of what population to use for the first *Gingles* factor, and that other circuits have used the same approach as *Campos*, the district court used the correct legal test." (App. 10a).

Until recently[1], the Fifth Circuit followed a standard that focused on whether Section 2 plaintiffs could establish that they possessed the ability to elect candidates of their choice absent the challenged structure. *Campos v. City of Baytown, Texas* 840 F.2d 1240, 1244 (5th Cir. 1988) (reviewed total population to determine whether plaintiffs possessed the potential to elect candidates of choice); *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989) ("The appellants had the burden to prove the existence of a single-member district in which they could elect candidates of their choice."); *Westwego Citizens v. City of Westwego*, 946 F.2d 1109, 1117 n. 10 (5th Cir. 1991) ("As we held in *Westwego, II*, it is entirely proper to refer to evidence other than census data to establish the 'potential to elect'"); *Campos v. City of Houston*, 113 F.2d 544, 548 (5th Cir. 1997) (citizen voting age population is important to determine whether minority group possess the potential to elect candidates of their choice).

The Court of Appeals in this case adopted a "bright-line" test that may **only** be met by showing that Hispanics exceed 50% of the citizen voting age population of the demonstration district submitted by plaintiffs to satisfy their burden under *Gingles I.* (App. 9a-10a). Thus, as occurred here, Hispanic plaintiffs who establish in a Section 2 case that, in the totality of circumstances, a challenged election structure

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[1]Just prior to its decision here, the Fifth Circuit, for the first time, made clear its intent to adopt a "bright line" test in evaluating the first prong of *Gingles* even to the exclusion of election data demonstrating the electoral feasibility of the putative district: ". . . evidence that the group may succeed in electing preferred candidates [from the putative district] cannot remedy its failure to meet the *Gingles* threshold." *Perez v. Pasadena Independent School District*, 165 F.3rd 368, 373 (5th Cir. 1999).

dilutes their ability to vote and that a district can be drawn in which the minority group will have the ability to elect candidates of its choice, will nevertheless be foreclosed from pursuing their claims. This is particularly troubling as the next decennial census approaches.

It is now well settled that the *Gingles* threshold factors apply to Section 2 challenges to single-member redistricting plans as well as to challenges to multi-member and at-large election systems. *Growe v. Emison*, 507 U. S. 25, 40-41 (1993). Therefore, Hispanic citizens wishing to challenge election systems, including districting plans developed as a result of the publication of the year 2000 census, will be obliged, in the Fifth Circuit, to first establish that it is possible to develop districts with majority Hispanic **citizen** voting age population. (App. 9a-10a). No other manner of proof to show that it is possible to draw a potential remedy district will suffice. *Id.* The districting process will likely begin, with most jurisdictions, upon the publication of the 2000 census in early 2001. Yet, citizenship data is not made available until after the redistricting process is completed. *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1409 (N.D. Ill. 1997), *aff'd in part, vacated in part on other grounds*, 141 F.3d 699 (7th Cir. 1998). *See Johnson v. DeGrandy*, 512 U.S. 997, 1021 n. 18 (1994) (citizen voting age population not available at trial). Politically cohesive Hispanic citizens in the Fifth Circuit will therefore be foreclosed from any challenge under Section 2 of the Voting Rights Act of gerrymandered redistricting plans for several years while they await the publication of dated citizenship data, regardless of the size and concentration of the minority community.

Moreover, politically cohesive Hispanic citizens who may not be able to demonstrate, even after the publication of citizenship data, the ability to draw a majority Hispanic citizen

voting age population district, but who nevertheless can show that a viable electoral alternative exists (a district in which they actually have the potential to elect candidates of their choice) will be forever foreclosed from challenging even the most blatant racial gerrymandering in districting plans or discriminatory at-large election systems under Section 2. Numerous reasons may explain why a politically cohesive and geographically insular Hispanic community may not be able to draw a district with 50% or greater Hispanic citizen voting age population.

First, citizenship census data is based upon sample data, rather than the actual headcount used for redistricting. *Barnett*, 969 F. Supp. at 1409. Second, citizenship data is only available at the block group level rather than the block level upon which redistricting is based. *Id.* Third, the citizenship census data relied upon by the district court provides only a snap-shot view of citizenship levels in 1990, and thus does not take into account changes in citizenship levels since 1990 due to naturalization and the amnesty program of the Immigration and Naturalization Control Act of 1986. *King v. State Board of Elections*, 979 F. Supp. 582, 612-613 n. 58 (three judge court) (N. D. Ill., 1996), *aff'd.* __ U.S. __, 139 L.Ed.2d 866 (1998). Therefore, citizenship census data required by the Fifth Circuit to prove the *Gingles* factor is less reliable than the actual head count used for redistricting. *Id.*

The inability to draw a so-called majority Hispanic citizen voting age population district may, thus, have more to do with the unreliability of the data than with past and present reality. Yet, data generally useful in determining whether the Hispanic community possesses the potential to elect candidates from a putative district is useless under the Fifth Circuit's test. For example, as was done here, even if plaintiffs establish through the 1990 census data as well as through election data

that the submitted districts provide Hispanics with the potential to elect candidates of their choice, under the Fifth Circuit's rule such evidence cannot "remedy [plaintiffs'] failure to meet the *Gingles* threshold." *Perez v. Pasadena I.S.D.*, 165 F.3rd at 373. This standard, if generally followed, would allow jurisdictions to freely gerrymander cohesive Hispanic communities, and would leave Hispanic citizens in many at-large jurisdictions with no recourse under Section 2 of the Voting Rights Act.

Certiorari should be granted because the decision of the court of appeals has foreclosed an important cause of action under Section 2 of the Voting Rights Act to Hispanic citizens who will be left with no recourse to remedy even clearly gerrymandered districting plans and clearly discriminatory at-large election systems.

II. The Decision Below Conflicts with the Decisions of this Court and those of other Circuits.

The Fifth Circuit established a "bright-line" test that **only** by producing a single-member district with majority of Hispanic citizen voting age population may an Hispanic plaintiff establish the *Gingles I* threshold factor that a minority group be sufficiently large and geographically compact to form a majority in a single member district. (App. 8a-10a). This harsh holding conflicts with the rulings of this Court and is contrary to the decisions of other Circuits.

This Court first elaborated on the basic analytical framework established for evaluating a claim under Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Court provided some structure to the statute's "totality of circumstances" test in a case challenging North Carolina's legislative districts. *Gingles*, 478 U.S. at 47-51. The Court listed the factors outlined in the Senate Report concerning the

1982 amendments to the act and held:

> Under a "functional" view of the political process mandated by §2, . . . the most important Senate Report factors bearing on §2 challenges to multimember districts are "the extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political sub-division is racially polarized". . . If present, the other factors, . . . are supportive of, but *not essential* to, a minority voter's claim. *Gingles*, 478 U.S. at 48 n.15. (Citations omitted)

This Court also identified three threshold factors generally necessary to prove a Section 2 claim:

> Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. *Gingles*, 478 U.S. at 49.

This Court described a "geographically insular minority group" as a minority group that could comprise a majority in a single-member district. *Gingles*, 478 U.S. at 50. This Court reasoned that this factor was important to show that the minority group had the potential to elect candidates of their choice absent the challenged election structure. *Gingles*, 478 U.S. at 50 n.17. This Court has since recognized that the *Gingles* factors, including the geographically insular factor, should not be mechanically applied. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). The Court has also recognized that in some instances the geographic insularity factor would have to be modified to account for districts in which minority voters

could elect candidates of choice with the help of cross-over white voters in less than majority-minority districts. *Id.* In fact, this Court recognized that even the question of what benchmark data is appropriate for evaluating the *Gingles* threshold factor is unsettled. *Growe*, 507 U.S. at 38 n. 4. Even so, the Court recognized that in some communities, minority voters disadvantaged by at-large election systems may not need super-majorities in a single-member district in order to elect candidates of their choice. *Gingles*, 478 U.S. at 89 n.1 (O'Connor concurring in judgment); *Johnson v. DeGrandy*, 512 U.S. at 1006-1010 (1994). *See*, *Bush v. Vera*, 517 U.S. 952, 135 L.Ed.2d 248, 272 (1998) ("[T]he complexity of the districting process, [is] such that bright-line rules are not available.").

Clearly the new rule of the Fifth Circuit, establishing a mechanical, unbending "bright-line" test for evaluating the *Gingles I* threshold factor is inconsistent with the teachings of this Court that Section 2 claims be evaluated in a searching, functional, and comprehensive canvassing of the relevant facts.

The decision of the court of appeals is also contrary to the decisions of other federal courts. In *Sanchez v. State of Colorado*, 97 F.3rd 1303, 1311 (10th Cir. 1996), the court determined that the first *Gingles* factor required the plaintiff to show that a reasonable alternative exists to the challenged structure. In determining plaintiffs had met their burden under *Gingles I* by submitting a plan with just over 50% Hispanic voting age population, the court reasoned that "[b]ecause *Gingles* advances a functional evaluation of whether the minority population is large enough to form a district in the first instance, the Circuits have been flexible in assessing the showing made for this precondition." In *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990), the en banc court of the Eleventh Circuit determined that while voting age

population is one accurate measure of the potential for a minority group to elect their own candidates, a minority group that cannot establish that it is an absolute majority of a single member district may still bring an action under the Voting Rights Act so long as it can demonstrate that it has the potential to elect in its demonstration district. ("So long as the **potential exists that a minority group could elect its own representative** in spite of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act.")(emphasis added). In *King v. State Board of Elections*, 979 F. Supp. 582, 612-613 n.58, the court specifically rejected the use of citizen voting age population as the **exclusive** measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor. In *Uno v. City of Holyoke*, 72 F.3rd 973, 985-86 (1st Cir. 1995), the court approved a finding that plaintiffs had met the *Gingles I* requirement by producing an Hispanic majority voting age population district and by showing that such district consistently elected Hispanic candidates. These federal courts have thus consistently examined the *Gingles I* requirement in a flexible and functional approach, in sharp contrast to the rigid approach employed by the Fifth Circuit.

The reasoning of the majority of the Circuits is consistent with this Court's instruction in *Gingles*. The importance of the geographic insular minority group issue is related to the ability of a plaintiff to show that the challenged structure is at the root of the discrimination by demonstrating that a reasonable alternative exists:

> Unless minority voters possess the **potential to elect** representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by the practice.

Gingles, 478 U.S. at 50-51 n.17 (emphasis added).

The focus has thus been on whether the minority group is concentrated enough to benefit from a geographical districting scheme, without restricting how that may be proven. *See, e.g., Solomon*, 899 F.2d. at 1018 n. 7 ("This holding should not be read to imply an opposite result where blacks do not constitute an outright majority of the voting age population in any district. So long as the potential exists that a minority group could elect its own representative . . ."); *Sanchez*, 97 F.3rd. at 1314-1315 ("As we have noted, satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible; a remedy is possible. The evidence surely established the Hispanic population is 'sufficiently large,' the current district including 48.82% Hispanic population."). *See also* Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment," 34 Hastings L. J. p.58 (1982).

The Fifth Circuit's approach, on the other hand, overemphasizes and oversimplifies the point by focusing on the assumption that because only citizens have the right to vote, citizen voting age population should be used as the exclusive benchmark for evaluating whether a reasonable remedy is available. *Campos v. City of Houston*, 113 F. 3rd at 547 ("Only voting age persons who are United States citizens can vote"). Such an approach, while perhaps easier for a district court to administer, is inconsistent with *Gingles* and with the intent of Congress, as well as contrary to the rulings of other federal courts.

Certiorari should, therefore, be granted because the decision of the Fifth Circuit is contrary to the decisions of this Court and other federal courts, and to resolve the question of the appropriate measure for evaluating plaintiffs' *Gingles*

evidence.

III. The Decision of the Court of Appeals is Inconsistent with the Intent of Congress in the 1982 Amendments to the Voting Rights Act.

In amending Section 2 in 1982, one of Congress' primary concerns was the potential for vote dilution through the use of at-large elections. S. Rep. No.417, 97th Cong., 2d Session. 30 (1982)(Section 2 was designed to reach discriminatory "election system features such as at-large elections"). Moreover, Congress never intended that in evaluating the impact of an election structure "any particular number of factors be proved." S. Rep. No.417, at 29. In fact, Congress endorsed the approach applied by this Court in *White v. Regester*, 412 U.S. 755, 769-770 (1973), that the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality." *Id.* Congress, in amending Section 2, adopted a functional view of evaluating vote dilution rather than the formalistic approach adopted by the court of appeals. S. Rep. 417, at 30 n.120. This Court has recognized the Congressional intent that Section 2 evaluations should be guided by a comprehensive rather than mechanical and limited evaluation. *Johnson v. DeGrandy*, 512 U.S. at 1011 ("conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts").

The record here established that the plaintiffs submitted a reasonable alternative to the discriminatory at-large election system, *i.e.* districts that afforded Hispanics an opportunity to elect candidates of their choice. The plan submitted by the Hispanic citizens contained one district with majority Hispanic population, majority Hispanic voting age population and

majority Hispanic citizen voting age population based upon census data. (App. 3a). The unrefuted record demonstrates that single member districts from other jurisdictions in the geographic area adjacent to the putative district and with smaller Hispanic population concentrations had elected Hispanic candidates. (Tr. Vol.7, pp. 639-640). In spite of this record, the Fifth Circuit determined that because plaintiffs' putative district did not contain a majority Hispanic citizen voting age population according to admittedly inaccurate population projections of the Defendants, Plaintiffs had failed to meet their *Gingles* threshold obligation. (App. 11a). Such a mechanical approach to evaluating plaintiffs' Section 2 claim subverts the intent of Congress and, therefore, certiorari should be granted.

The Fifth Circuit's analysis under *Gingles* was based upon an improper legal standard that has foreclosed an important protection of the Voting Rights to Hispanic citizens, is inconsistent with the decisions of this Court and those of other circuit courts, and with the intent of Congress when it amended the Voting Rights Act in 1982.

IV. The Decision of the Court of Appeals Creates a New Standard for Replacement of Presumptively Valid Census Data.

The federal decennial census is presumed accurate until proven otherwise, and is therefore the most recent and accurate measure of population. *Latino Political Action Committee v. City of Boston*, 568 F.Supp. 1012, 1018 (D.C. Mass. 1983), *aff'd*, 784 F.2d 409 (1st Cir. 1986) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969)). Although populations change constantly and kinks in that data are common, *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), a "high degree of accuracy" of replacement data is required to supplant the

population figures of a prior decennial census. *Kirkpatrick v. Preisler*, 394 U.S. at 535. The standard to be applied is that decennial census figures will control unless there is "clear, cogent and convincing evidence" that both: 1) the current census figures are no longer valid, and 2) those population figures proposed for use are the best evidence of the current population. *Dixon v. Hassler*, 412 F.Supp. 1036, 1040 (W.D.Tenn.) (three judge panel), *aff'd sub nom., Republican Party v. Dixon*, 429 U.S. 934 (1976) (rejecting use of estimates prepared by a private corporation for the Bureau of the Census using population changes by census tract from the preceding decade, population density and land area of the tract, information from the preceding census about housing type, housing value, income and age of people and family structure, and listed telephones and registered automobiles for the tract).

When efforts are undertaken to adjust decennial population data, those efforts must be accomplished in a consistent, systematic process, not through an *ad hoc*, haphazard scheme. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

> Situations may arise where substantial population shifts over a period of time can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be throughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner.

Kirkpatrick v. Preisler, 394 U.S. at 535.

In 1990, ten years after the 1980 census, but a year

before release of the 1990 census data, the district court in *Garza v. Los Angeles County*, 756 F.Supp.1298 (C.D.Cal. 1990), supplanted census information with other population information (known as PEPS data) to analyze the effects of the redistricted election system for Los Angeles County on Hispanic voters and the potential for a remedial plan. *Id.* at 1321. The reliability of the *Garza* data used was thoroughly reviewed by the district court and described in its findings of fact and conclusions of law where the court characterized the data as a "unique and reliable source." F.Supp. at 1321. The court found the data was "all keyed back to the base line census point." *Id.* The data, which included both estimates and projections, had been developed over time. Four iterations had been produced for a five year period: in 1985, 1987, 1989 and 1990. *Id.* The data was based on information derived from the 1980 census, the California Department of Finance, and administrative and vital records. *Id.* Estimates were from observations of populations trends that occurred in the past according to administrative records and projections based on past and present trends and estimates of future situations. *Id.* Upon comparison to estimates from the Department of Finance and the Census Bureau, the court found the data "revealed high levels of consistency." *Id.* at 1322. The data was in use by governmental entities in Los Angeles County for planning functions, and was an independently verified source of reliable data. *Id.* at 1321. [2]

Moreover, the data relied on by the *Garza* court to

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[2] The Department of Health Services, the Department of Mental Health, the Sheriff's Department, the Superior Court system, the Municipal court system and the Public Library system, all branches of government in Los Angeles County, used the PEPS data for planning purposes for their official functions. *Id.*

supplant decennial census data was applied throughout the county and in a systematic, not *ad hoc*, manner. *Id.* at 1321-22. *See Kirkpatrick v. Preisler*, 394 U.S. at 535.[3]

This Court has required not only that the inaccuracy of the decennial census be demonstrated by clear and convincing evidence, but also that the replacement data be shown to be the best evidence of population and highly accurate. *Kirkpatrick v. Preisler*, 394 U.S. at 535. The data approved for use in this case to displace census data and defeat plaintiffs' voting rights claim was not only demonstrated to be **not accurate**, it was shown to be: 1) speculative data regarding projections for future population levels and 2) applicable only to a small area of the entire school district.

The Fifth Circuit's cavalier treatment of the standards established by this Court for substituting population information for census data wreaks havoc on historical standards applied to redistricting and threatens to "import a high degree of arbitrariness into the process." *Karcher v. Daggett*, 462 U.S. at 733. If allowed to stand, the new rule will affect not only this case, but will provide a completely new arena for redistricting litigation. It will generate continuous litigation at all levels of government throughout the decade, throwing political processes into constant turmoil and upheaval because of decisions or investments by and at the whim of

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[3] Only one other reported case approved supplanting decennial census data with alternative data. In *Meeks v. Avery*, 251 F.Supp. 245 (D.Kan. 1966), the court approved supplanting census data with population data derived from an enumeration accomplished annually in an actual head count that was conducted by deputy county assessors for the state of Kansas pursuant to state law.

developers. Basically, every new development or plan to develop could give cause for redistricting litigation.

In an effort to substantiate a clearly erroneous decision by the district court to allow substitution of population "information" designed to defeat the plaintiffs' challenge to an at-large election scheme for census data, the appellate court (and the district court) intoned precedential language to imbue a patina of scientific authority to what was a nakedly inadequate data set under all Supreme Court cases. The appellate court, and the district court below, threw out the window the repeated cautions from this Court that any readjustments of census data have to be consistent and accomplished or applied across the jurisdiction to be accepted as replacement data for decennial census information.

The district court and the appellate court below relied on the Fifth Circuit's *Westwego Citizens for Better Government v. City of Westwego*, 906 F.2d 1042 (5th Cir. 1990), for the proposition that wholesale replacement of census data for a jurisdiction with "non-census" data is permissible when "census data is not sufficiently probative . . . of a population."[4]

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[4] In *Westwego*, the population information that was missing was voting age data by race, data describing a characteristic of an existing population data set derived from the decennial census. *Westwego Citizens for Better Government v. City of Westwego*, 906 F.2d at 1045, n.3. The court allowed other information from governmental administrative records and unsuppressed census population information to be used to describe those characteristics. In this case, the district and appellate courts have approved the creation of a population data base with implied and unverifiable characteristics derived from unofficial sources, and its insertion into an aged population data base to create a crazy quilt of

(App.11a and 22a). The appellate court bolstered its position with its prior determination in *Perez v. Pasasdena Independent School District*, 165 F.2d at 371 affirming the district court's rejection of projections of growth in the Hispanic population that were based on past trends in the jurisdiction and compared to demonstrated school population growth over time during the current decade.[5] (App. 11a). The appellate court gave only a wink and a nod to this Court's firm holdings in *Karcher* and *Kirkpatrick*, characterizing that authority as "indirect," despite lifting language from those decisions to underpin the new standard it created. (App. 17a).

The Defendants' expert's report, which the lower courts accepted as "clear and convincing," froze the population all of the school district at 1990 levels, except the apartment complex

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population information about Alamo Heights I.S.D.

[5] The *Pasadena* court disapproved use of projections of citizen voting age population based on a prior twenty year trend of demographic changes, that had been applied throughout the school district, as part of the evidence demonstrating potential to create a majority Hispanic citizen voting age population district five years after the decennial census and satisfy the *Gingles I* criteria, and required plaintiffs to rely only on 1990 census data. *Perez v. Pasadena Independent School District*, 165 F.3d at 371. Plaintiffs' demographic expert had testified that the methodology was appropriate and likely under predicted actual growth rates. In this case, the Fifth Circuit has approved use of population projections (into the future) in a select area of a school district, with implied characteristics for those populations that have no foundation in census data and cannot be verified, to replace decennial census data in order to defeat minority plaintiffs' ability to meet the *Gingles I* criteria and voting rights claim.

inside and new housing immediately outside plaintiffs' putative district. (R. Vol.7, pp. 643, 645-650). The expert focused only on a remodeled existing apartment complex inside the district and new construction areas outside the district, in developing his substitute data set. Applying differing population rates in the complexes and projecting future, as yet non-existent, population for new construction areas he created a "base" population data set to adjust the 1990 census for the school district. (R. Vol.7, pp. 645-658; P-63). Further, he made assumptions based, not on tangible or reliable data, but on hypotheses and conjecture regarding both use of the housing units and population groups potentially inhabiting those housing units at some time in the future.[6] (R. Vol.7, p. 659). He treated the limited population trends he examined inside the putative district one way using one set of assumptions, and trends outside the putative district another way, resulting in the favorable end he sought to achieve. (R. Vol.7, pp. 670-671, 673-674, 685-687).

Then defendants' expert completely disregarded past demographic trends in the school district and immediately

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[6] Unable to establish a base line 1990 population for the apartment complex in the plaintiffs' putative district (known as The Oaks before remodeling and The Reserve after remodeling) defendant's expert made up numbers to fit his end, changing the number of residents allegedly living in the apartment complex when it closed in each of four separate reports on demographics in the school district produced in 1995, 1996 and April and August of 1997. (R. Vol.6, pp. 442, 567; R. Vol.7, pp. 647-650; P-63). The demographer also assumed, without basis, that all residents of the Oaks (most of whom were Hispanic) left plaintiffs' putative district and the school district when the apartment complex closed. He made no effort to verify that assumption. (R. Vol.7, pp. 656-658).

surrounding metropolitan areas which showed essentially growth of 28% in the Hispanic community and general decline in the school district's population overall (P-37), and testimony of the superintendent of the school district that there had been no decline in Hispanic student enrollment in the district. He studied no present or past census demographic information to assess what could be happening in 90% to 95% of the remainder of the populated area of the school district. He did not look at birth rates, death rates, in or out migration, changes in citizenship status or estimates of population undercounts or overcounts. (R. Vol.7, pp. 642-643, 710). He did not do so because he said it was not necessary when estimating population for small areas, basically when assessing population for two apartment complexes, allegedly housing between 5% and 10% of the school district's population, depending on which of the four reports he produced is relied on. (P-63).

The appellate court determined that the district court did not commit clear error when that lower court accepted the school district's April "1997" data as overcoming the 1990 census figures even though the report was the third of four separate and different "demographic" reports produced by the expert at different times, using different methodologies, relying on different assumptions and reaching different conclusions about "population changes" in the school district. (App. 11a-12a). Further, the April report had been abandoned by the school district in favor of the August 1997 report. (R. Vol.7, pp. 642-645, 654-655, 691). It **had not been offered** as evidence of best population information by the school district. Instead, a new report produced three months later, in August of 1997, which contained "more current data" and "corrected a calculation error" was the factual data upon which the trial was conducted. (App. 11a). However, the trial court rejected the August report in favor of the April report (App. 27a, 30a) despite the fact that both sides acknowledged the April report

was incorrect. The appellate court found there was no error because the bottom line was under either the August or April report, plaintiffs could not produce a majority Hispanic citizen voting age population district. (App. 11a).

The real danger of the appellate court's ruling is the arbitrariness introduced into redistricting litigation by acceptance of any data showing "change" to replace the decennial census while not requiring a showing of the validity of replacement data or adjustment of population anywhere but the focus "change" areas. The 1995 report of the district's expert had assumed a number for occupancy of The Reserve in 1990 and subtracted that population from the putative district. (R. Vol.7, p. 657). The occupancy number was increased in both the later April and then August 1997 reports by 10%. The August report more than doubled the "population growth" attributable to the select areas being analyzed by the expert, thus increasing the number of people required for an "ideal" district. (Compare: P-63 April Report at pg.12 to P-63 August report at pg.14). Defendants' expert admitted that the April report contained errors such as a 7% lower occupancy rate and average person per household for the "Hispanic" Reserve complex than actual rent rolls showed and calculated a lower average occupancy rate and average person per household for the Reserve than for the assumed "Anglo" housing units outside of the putative district. (R. Vol.7, pp. 654-655, 685-687). The April report allowed a 32% higher occupancy rate for Anglo housing units than actually existed because defendants' expert thought it should be that way. (R. Vol.7, pp. 670-674). The meter hook-up information relied on by the expert for his housing stock calculations just happened not to include new meter hook-ups in plaintiffs' putative district. (R. Vol.7, pp. 702-705).

After excluding a house to house survey conducted by

Plaintiffs in a neighborhood immediately adjacent to the putative district showing large increases in Hispanic population in that area[7], the court found plaintiffs were unable to introduce demographic studies contradicting the defendants' expert's report and determined that the April report "reflect[ed] the demographic realities of Alamo Heights." (App. 26a). The appellate court affirmed the district court, finding no clear error in its determination that the Rives' report "was clear and convincing in its demonstrated [sic] of sufficient post-census demographic changes to erode the Hispanic majority in the Plaintiffs' demonstration district." (App. 12a). Going beyond its finding of no clear error, the appellate court approved the use of the "housing stock methodology" and its accompanying use of "municipal power company's records of new electrical hook-ups" and projections of future population as acceptable methodologies for calculating population information sufficient for wholesale replacement of decennial census information. (App. 12a). Neither court ever addressed the blatant omission by defendants' expert of what had happened to most of the population in the rest of the district over the course of the seven years since the decennial census, nor the effect of mixing the data from the decennial census with the non-census data for select areas and purposes only.

This case lacks the level of assurance provided in *Garza v. Los Angeles County*, one of two cases where census data has

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[7]An example of the fallacy of the defendants' expert's methodology is demonstrated in his affidavit in November, 1996 filed in response to Plaintiffs' Motion for Partial Summary Judgment. In it he asserted that no Hispanic majority blocks were adjacent to the putative district. (App. 5a). Plaintiffs' excluded, but proffered, survey evidence showed that in 1997, those blocks did exist south of the putative district. (App. 6a, 14a, 29a).

been replaced by other population information, that the replacement data approved had validity and was not arbitrary.[8] It was sufficient for both courts, however, that the data, regardless of its absence of accuracy, showed plaintiffs could not get over the hurdle of being unable to create a majority Hispanic voting age population under *Gingles*. In sharp contrast, both courts recognized that using decennial census, Plaintiffs met their *Gingles I* burden. "It is undisputed that using 1990 census data, it is feasible to draw a redistricting plan that satisfied the first *Gingles* requirement." (App. 3a, 24a).

As another decennial census approaches, certiorari should be granted to establish standards for determining when replacement of census data is appropriate and evaluating the data offered to supplant census information. Otherwise, the appellate decision in this case promises to cause significant chaos for plaintiffs and governments in redistricting for the foreseeable future.

CONCLUSION

The United States Supreme Court has stated that in a minority vote dilution case, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). Yet, the district and appellate courts in this case, without review or examination of two of the *Gingles* factors or the totality of circumstances, applied a "bright-line" test to Plaintiffs' evidence on the *Gingles I* threshold factor. Moreover, the

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[8] The appellate court's only assessment of the accuracy of the data was a belittling of plaintiffs' objections as "misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in Rives' methodology." (App. 11a).

Supreme Court has cautioned that only in very unusual circumstances should the census be discarded. *Kirkpatrick v. Preisler*, 394 U.S. at 534-535. Yet, the district court here accepted and the appellate court approved replacement data that was filled with error and based on haphazard methodologies in order to defeat the Plaintiffs' Voting Rights claim. The district court applied entirely new rules that are inconsistent or conflict with decisions of this Court and other Circuits. The appellate court's affirmation of the district court's new rules and dismissal of Plaintiffs' vote dilution claim because they failed to meet the *Gingles I* merits the grant of certiorari.

In seventy years of existence, Hispanic voters have never had a representative on Alamo Heights I.S.D. school board. Allowing this decision to stand perpetuates the deprivation of this most basic of fundamental rights in a representative democracy.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 98-50227

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT VALDESPINO; BRENDA ROLON,
Plaintiffs-Appellants,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT; ETHYL WAYNE, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; HARRY OREM, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; STEPHEN P. ALLISON, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; ANNE BALLANTYNE, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; THOMAS A. KINGMAN, In his official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; TERRI MUSSELMAN, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas; VICKI SUMMERS, In her official capacity as a member of the Board of Trustees of the Alamo Heights Independent School District, San Antonio, Texas,
Defendants-Appellees.

March 11, 1999, Decided

COUNSEL: For ROBERT VALDESPINO, BRENDA ROLON, Plaintiffs - Appellants: Mark Stanton Smith, Heard & Smith, Judith A Sanders-Castro, Les Mendelsohn & Associates, San Antonio, TX.

For ROBERT VALDESPINO, BRENDA ROLON, Plaintiffs - Appellants: Jose Garza, Edinburg, TX.

For ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, STEPHEN P ALLISON, ANNE BALLANTYNE, THOMAS A KINGMAN, Dr, TERRI MUSSELMAN, VICKI SUMMERS, ETHYL WAYNE, HARRY OREM, Defendants - Appellees: C Robert Heath, Amy Wellington Flinn, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, Austin, TX.

JUDGES: Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

OPINIONBY: EDITH H. JONES

OPINION:

EDITH H. JONES, Circuit Judge:

The panel hereby withdraws its previous opinion and substitutes the following:

Plaintiffs-Appellants claim that the at-large, by-place, majority-vote elections for positions on the AHISD board of trustees dilute their votes as Hispanics in violation of Section 2 of the Voting Rights Act of 1965. See 42 U.S.C. § 1973 (1994) (as amended). The district court found that the Plaintiffs failed to make out a vote dilution claim because they could not prove, under the first Gingles threshold factor, that Hispanics are a "sufficiently large and geographically compact [group] to constitute a majority in a single-member district." Thornburg v. Gingles, 478 U.S. 30, 50, 106 S. Ct. 2752, 2766, 92 L. Ed. 2d 25 (1986). All the issues on appeal involve proof of the first Gingles factor. In particular, we reject the appellants' contention that a "majority" may be less than 50% of the citizen voting-age population. As appellants' other contentions fare no better, the judgment is affirmed.

I.

The School District conceded at trial that the Plaintiffs' demonstration district n1 did comprise a majority of Hispanic voting-age citizens according to 1990 census data. The School District, however, presented evidence that demographic changes between the 1990 census and the 1997 trial had eliminated that majority. AHISD is a small district in which a few strategic land-use changes could and did significantly alter the district's population and neighborhood ethnic mix.

The School District's evidence was presented in expert testimony by Dr. Bill Rives, a demographer. Using the 1990 census data as a baseline, Rives investigated post-1990

changes in the school district's housing stock to determine how the population had changed in the Plaintiffs' demonstration district and in the school district at large. He testified that this methodology is "by far the most popular demographic estimation technique" and is especially appropriate for small areas.

Rives testified that two main trends combined to leave the Plaintiffs' demonstration single-member district "underpopulated" in 1997. Since 1990, the demonstration district had lost population (and the proportion of Hispanics in the demonstration district declined) because a large apartment complex had closed, been renovated, and reopened with a smaller number of residents. Simultaneously, the population of the school district at large had increased because of substantial new residential development in the Lincoln Heights area (formerly a quarry and cement plant), outside the demonstration district. As a result of these changes, the Plaintiffs' demonstration district no longer approached one-seventh of the school district's population, and thus could not be a proper single-member district.

To correct for the underpopulation, Rives added territory to the demonstration district. He added a contiguous area to the north that had been included in some of the appellants' prior proposed demonstration districts. That northern area ran clear to the edge of the school district and had just about the right number of people to make a proper district. Furthermore, if it were not added to the Plaintiffs' district, the northern area would have to be attached to a different district via a mile-long, narrow strip of unpopulated land. After the northern area was added to the demonstration district population, Hispanics made up only 47.9% of the voting-age citizen population of the revised demonstration district. Even

if the demonstration district were then partially depopulated (by 8.1% of the ideal population), this number would be 48.3%.

The general thrust of Rives's testimony had been clear for some time before trial. For example, in a November 1996 affidavit attached to the Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, Rives had explained that no additions to the Plaintiffs' proposed demonstration district could sufficiently increase the Hispanic population because "there are no Hispanic-majority blocks that are adjacent to the proposed district." As the trial grew nearer, Rives updated his analysis, redoing calculations based on more recent data from the apartment complexes about the ethnicity of their residents. Ultimately, the district court relied on Rives's April 1997 Report.

Much of the controversy in the case comes from Rives's August 1997 Report. In July 1997, updated rental rolls became available from The Reserve, the large apartment complex within the Plaintiffs' demonstration district that had been renovated and reopened since the 1990 census. Rives then recalculated the results in his April 1997 report after learning that The Reserve had a slightly higher proportion of Hispanic residents than he had earlier believed. But he also corrected a calculation error in his April Report that had understated population growth in the school district at large. Nevertheless, he concluded that the revised data still did not yield a majority of Hispanics among voting-age citizens within the Plaintiffs' demonstration district. The August Report was given to the Plaintiffs in early August 1997, not long before the original trial setting. On August 22, however, the district court reset the trial for Monday, September 15.

The Plaintiffs' proffered expert witness, George Korbel, claims that he was surprised by the conclusions in Rives's August Report. In response, Korbel scrambled the week before the September trial date to conduct a door-to-door survey of the residents in a small area to the south of the demonstration district. He thought he could find there a high proportion of Hispanic residents that could increase their demonstration district's population without diluting its Hispanic majority. At 4:21 P.M. on Friday, September 12, the Plaintiffs faxed to the School District's counsel a letter disclosing the existence of this new survey. At 4:13 P.M. on Saturday, September 13, the Plaintiffs faxed the data from the survey.

On the Monday morning set for trial, September 15, the School District filed a motion to strike the survey on grounds of unfair surprise. The Plaintiffs' lawyer told the district court that their case in chief would rest entirely on 1990 census data, but that if Rives testified for the School District that more current data changed the Hispanic majority, then the Plaintiffs might use the recent survey as rebuttal testimony. The district court postponed until rebuttal any ruling on the motion to strike and granted a motion in limine to prevent mention of the survey during the case in chief or cross-examination. During the Plaintiffs' rebuttal, the School District renewed its objections to the survey evidence, and the district court granted the motion to strike. The Plaintiffs filed an offer of proof as to what their expert witness would have testified about the survey.

In its findings of fact and conclusions of law, the district court reiterated that Korbel's survey constituted unfair surprise and was excluded under Local Rule CV-16(e). To accommodate the Plaintiffs' objections to the lateness of

Rives's August Report, the district court decided to rely solely upon the April Report, which it found to be "thoroughly documented, [with] a high degree of accuracy," and "clear, cogent, and convincing enough to override the presumptive correctness of the prior decennial census." Relying on Rives's report, the district court found that the Plaintiffs had not proved a demonstration district with less than 10% population deviation that included more than 50% Hispanics among its voting-age citizens.

On appeal, the Plaintiffs present three arguments: that they were not required to meet a "bright line" test of 50% Hispanic voting-age citizens in their demonstration district; that the School District's evidence did not adequately overcome the presumed accuracy of the 1990 census data; and that the district court abused its discretion in excluding Korbel's proposed rebuttal testimony about the last-minute, door-to-door survey.

II.

This court reviews district court "findings on the Gingles threshold requirements for clear error." League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist., 123 F.3d 843, 847 (5th Cir. 1997). See also Gingles, 478 U.S. at 77-79, 106 S. Ct. at 2780-81. A district court's refusal to allow an expert to testify as a rebuttal witness may be overturned only for abuse of discretion. See Tramonte v. Fibreboard Corp., 947 F.2d 762, 764 (5th Cir. 1991); Bradley v. United States, 866 F.2d 120, 124 (5th Cir. 1989).

III.

The Supreme Court has established a three-part threshold inquiry when a racial or ethnic minority group asserts that its distinctive votes have been submerged by the racial majority in a multimember legislative district. The minority group must be able to (1) "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "show that it is politically cohesive," and (3) "demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances ... -- usually to defeat the minority's preferred candidate." Gingles, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

The Plaintiffs here argue that the district court erred in applying the first Gingles factor as a "bright line" requirement. The Plaintiffs advert to the general purpose of the Gingles factors, which is to provide a framework for showing that there could be "a single-member district in which they could elect candidates of their choice." This is intended to support the proposition that the Plaintiffs need only show generally their electoral potential. The Plaintiffs further argue that the Supreme Court has disavowed "mechanical[]" application of the Gingles factors. n2 And they complain that the district court did not evaluate evidence of vote dilution under the totality of the circumstances test.

All of these complaints are baseless. In reality, this court has interpreted the Gingles factors as a bright line test. Each factor must be proved before it is necessary to proceed to the totality of the circumstances test. We have repeatedly disposed of vote dilution cases on the principle that "failure to establish any one of these threshold requirements is fatal." Campos v. City of Houston, 113 F.3d 544, 547 (5th Cir. 1997); accord Rangel v. Morales, 8 F.3d 242, 249 (5th Cir. 1993); Overton v. City of Austin, 871 F.2d 529, 538 (5th Cir.

1989). See also Growe v. Emison, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388 (1993) ("Unless [the three Gingles factors] are established, there neither has been a wrong nor can be a remedy.").

Furthermore, contrary to the Plaintiffs' suggestion, this court has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population in the demonstration district. In Gingles, the Supreme Court required plaintiffs to demonstrate "a majority." 478 U.S. at 50, 106 S. Ct. at 2766. Both of the Fifth Circuit cases cited by the Plaintiffs assumed that 50% was the threshold for "majority" and simply addressed what evidence could be used to prove that the 50% threshold was met. In Brewer v. Ham, the court acknowledged that a super-majority of black residents could be used to prove that blacks constituted a majority of voting-age residents. See 876 F.2d 448, 452 (5th Cir. 1989) (citing cases with raw super-majorities of 65.9%, 71.5%, and higher). In Westwego II, this court repeated Brewer's holding and expanded on it in a footnote. The footnote, much cited by the Plaintiffs, explained that those plaintiffs "unable to produce hard data" on voting-age population because of the way census data are collected and reported would be able to submit "other probative evidence" to prove voting-age population. See Westwego Citizens for Better Gov't v. City of Westwego, 906 F.2d 1042, 1045 n.3 (5th Cir. 1990). In context, Westwego II's statements did not alter what must be proved, only what can be used to prove it. The Plaintiffs still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district.

Finally, this court has already determined what factors limit the relevant population in the district: voting-age and

citizenship. This was made clear in Campos v. City of Houston, 113 F.3d 544, 548 (5th Cir. 1997) (courts "must consider the citizen voting-age population" in evaluating the first Gingles factor). See also Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368, 372 (5th Cir. 1999). Given that the Supreme Court has avoided the issue of what population to use for the first Gingles factor, n3 and that other circuits have used the same approach as Campos, n4 the district court used the correct legal test here.

IV.

In this case, evaluating the district court's application of that test involves two questions: whether the School Board's evidence was adequate to counter the Plaintiffs' census data, and whether the district court abused its discretion in excluding the Plaintiffs' proposed rebuttal evidence.

A.

Except for a cavil, the parties and the district court essentially agree about what standard should be required to overcome census data. n5 As the district court summarized it:

> Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census.

This standard appears to be an elaboration on one used by the Seventh Circuit. See McNeil v. Springfield Park Dist., 851 F.2d 937, 946 (7th Cir. 1988). Two Fifth Circuit cases are

relevant. n6 The first is Westwego II, which, as mentioned above, opened the door to the use of non-census data when census data are not sufficiently probative of the voting-age proportion of a population. See Westwego, 906 F.2d at 1045 n. 3. The second is Perez, in which this court affirmed a district court's decision that the plaintiffs' population projections were too unreliable to overcome 1990 census data. See Perez, 165 F.3d at 373. Based on Westwego and Perez, the district court properly acknowledged the persuasiveness of census data while admitting evidence that demonstrated its inaccuracy in this case. Because the district court found that the School Board's 1997 population data overcame the 1990 census figures, the question is whether that finding was clearly erroneous.

The Plaintiffs present a laundry list of purported problems concerning the methodology of Rives, the School Board's demographics expert. The School Board's responses as well as Rives's cross-examination at trial suffice to show that the Plaintiffs' challenges are generally misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in Rives's methodology, or based on the analysis in Rives's superseded 1995 reports. The Plaintiffs' most emphatic argument -- that Rives himself admitted his April Report was "wrong" -- is overstated, because Rives did so only in the context of explaining how the August Report was based on more current data and corrected a calculation error. Rives's admissions did not affect the underlying finding of both the April and August Reports: the Plaintiffs' demonstration district did not contain a majority of Hispanic voting-age citizens.

The general description of Rives's methodology given above reveals that the Gingles I issues in this case do not involve

any complicated statistical formulae or tests of significance that might bedazzle or bamboozle an unwary district court. Cf. Overton v. City of Austin, 871 F.2d 529, 544-45 (5th Cir. 1989) (Jones, J., concurring) (discussing some district courts' ill-founded assumptions about the levels at which correlation coefficients become statistically significant). The data here were relatively simple; their manipulation involved only rudimentary arithmetic.

Under these circumstances, the district court did not clearly err in deciding that Rives's report demonstrated sufficient post-census demographic changes to erode the Hispanic majority in the Plaintiffs' demonstration district. In doing so, we take special note of the School Board's responses to the Plaintiffs' three weightiest methodological criticisms, each of which the district court could have credited without committing clear error: (1) the housing stock methodology can be appropriate for calculating population changes in small areas, (2) it was appropriate to account for some apartment complexes by projecting their imminent populations at the end of ongoing lease-up periods, and (3) despite some lapses, the municipal power company's records of new electrical hook-ups were an accurate gauge of newly developed housing in the entire school district. Further, the School Board's methodology was much more sophisticated than the crude straight-line population projection that was rejected in Perez. See Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196, 1212-13 (S.D. Tex. 1997), aff'd, 165 F.3d at 373 (5th Cir. 1999).

B.

Even if the district court properly credited the School Board's post-census demographic evidence, the Plaintiffs argue that it

abused its discretion by excluding their proposed rebuttal evidence about post-census populations.

The district court excluded any evidence from Korbel's last-minute survey "because it unfairly surprised the Defendants," citing W.D. TEX. R. CV-16(e), under which the district court may, "upon the showing of good cause," permit a party to supplement the written summary of an expert's proposed testimony. n7

On appeal, the Plaintiffs offer two reasons why their evidence was not an unfair surprise: (1) Korbel had testified in his deposition that Hispanic population was available south of the demonstration district; and (2) the survey was done in response to "new methodologies and numbers" in Rives's August Report and was made available as soon as it was completed.

The Plaintiffs' first reason fails to account for how modern discovery handles expert witnesses. The Local Rule required a "written summary of [Korbel's] proposed testimony." It further required that summary to include "the basis of the opinions which purport to be the testimony of the witness" and "specific references to any exhibits that will be used by the witness in support of any opinions." W.D. TEX. R. CV-16(e) & note. It can scarcely be maintained that Korbel's cursory reference in a deposition could serve as adequate notice of his intent to rely on a door-to-door survey of a specific neighborhood. Nor could that deposition response have provided sufficient information for the School Board to prepare to cross-examine Korbel about the survey. Cf. Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir. 1996)

(initial expert disclosures not sufficiently "complete and detailed" to meet discovery order).

The Plaintiffs' second reason takes no account of the fact that the district court relied only upon Rives's April Report, the admissibility of which the Plaintiffs never contested. If the survey was made necessary only by the novelty of the August Report, then apparently it could not have been detrimental to the Plaintiffs to exclude both.

In sum, the court did not abuse its discretion by excluding this evidence for unfair surprise when the proffering party failed to meet its duty to supplement its expert disclosures. See Alldread v City of Grenada, 988 F.2d 1425, 1436 (5th Cir. 1993) (no error in excluding expert witness' testimony when information crucial to understanding it was not provided until two weeks prior to trial); Mills v. Beech Aircraft Corp., 886 F.2d 758, 764 (5th Cir. 1989) (proper use of discretion to exclude results from tests conducted by plaintiffs' expert the week before trial). n8

Because it was not an abuse of discretion to exclude the survey results on the grounds of unfair surprise, we need not address whether Korbel's survey would have constituted proper rebuttal testimony.

V.

For the foregoing reasons, the district court properly placed the burden on the Plaintiffs to prove a majority of Hispanics among voting-age citizens in their demonstration district; the district court did not clearly err in finding the School Board presented sufficient evidence to prove demographic changes since the census; and the district court did not abuse its

discretion in excluding the Plaintiffs' proposed rebuttal testimony for unfair surprise.

The judgment of the district court is AFFIRMED.

----------Footnotes----------

n1 The "demonstration district" is the hypothetical single-member district used by voting rights plaintiffs to demonstrate that they can satisfy the first Gingles factor (i.e., that their group could constitute a majority in a single-member district). Because the AHISD Board of Trustees has seven members, the Plaintiffs must propose a demonstration district that would be appropriate if the at-large district were divided into seven single-member districts.

n2 In Voinovich v. Quilter, the Supreme Court did say, "the Gingles factors cannot be applied mechanically and without regard to the nature of the claim." 507 U.S. 146, 158, 113 S. Ct. 1149, 1157, 122 L. Ed. 2d 500 (1993). The Court did so, however, because it was adapting the Gingles test, which was designed for challenges to multimember districts, so that it could be used for challenges to the packing of minority voters into existing single-member districts. Because that changed context is not relevant to this case, which challenges a multimember district, plaintiffs have no need to invoke non-mechanical application of the Gingles factors.

n3 See Johnson v. De Grandy, 512 U.S. 997, 1008-09, 114 S. Ct. 2647, 2656-57, 129 L. Ed. 2d 775 (1994); Growe v.

Emison, 507 U.S. 25, 38 n.4, 113 S. Ct. 1075, 1083 n.4, 122 L. Ed. 2d 388 (1993).

n4 See Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997) (using citizen voting-age population for first Gingles factor); Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) (same), overruled in part on other grounds by Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990). Cf. Barnett v. City of Chicago, 141 F.3d 699, 704 (7th Cir. 1998) (Posner, C.J.) (using citizen voting-age population to determine proportionality for Section 2 challenge to gerrymandering of single-member districts), cert. denied sub nom. Bialczak v. Barnett, 141 L. Ed. 2d 740, 118 S. Ct. 2372 (1998).

n5 The cavil is that Plaintiffs attempt to articulate a two-step test: "The decennial census is controlling unless there exists 'clear, cogent and convincing evidence' that the decennial figures are no longer valid and that other figures are valid." For this proposition, however, they cite only Garza v. County of Los Angeles, 756 F. Supp. 1298, 1345 (C.D. Cal. 1990). In fact, the Garza court specifically rejected the notion of a two-step test:

> 17. In order to overcome the presumption in favor of the 1980 census data, plaintiffs need not demonstrate that the census was inaccurate.
>
> 18. It is sufficient to conclude that there has been significant demographic changes [sic] since the decennial census and that there exist[] post-decennial population data that

> more accurately reflect[] evidence of the current demographic conditions.

Id.

n6 The only Supreme Court authority on this matter is indirect. See Karcher v. Daggett, 462 U.S. 725, 732 n.4, 103 S. Ct. 2653, 2659 n.4, 77 L. Ed. 2d 133 (1983) (in reapportionment, a state cannot "correct" census figures "in a haphazard, inconsistent, or conjectural manner"); Kirkpatrick v. Preisler, 394 U.S. 526, 535, 89 S. Ct. 1225, 1231, 22 L. Ed. 2d 519 (1969) (a state can consider post-census population shifts in redistricting if its findings are "thoroughly documented and applied throughout the state in a systematic, not an ad hoc, manner"). The Ninth Circuit refused to apply the Seventh Circuit's "high standard" of "clear and convincing" evidence "in a case where intentional discrimination has been proved, and the data is merely to be used in fashioning a remedy." Garza v. County of Los Angeles, 918 F.2d 763, 773 n. 3 (9th Cir. 1990).

n7 Alternatively, in a footnote, the district court noted that the methodology and execution of Korbel's survey were too flawed for the results to overcome the presumptive correctness of the 1990 census. Although it appears quite compelling, the School Board does not press this line of argument, and we need not pursue it since we hold that the evidence was properly excluded due to unfair surprise.

n8 The survey evidence was also unnecessary once the district court excluded the District's August Report. This satisfies the first factor of a four-factor test that has sometimes been applied in evaluating a district court's exercise of discretion: "(1) the importance of the witness's

testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness." Bradley v. United States, 866 F.2d 120, 125 (5th Cir. 1989). See also Sierra Club, 73 F.3d at 572 (using same four factors in evaluating exclusion of evidence as sanction for violating discovery order). The Plaintiffs would also appear to fare quite poorly on the fourth factor, since it was obvious from the beginning that the School District would present evidence of 1997 population. Neither party addresses the four-factor test on appeal, though the School District discussed it in its original motion to strike.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT VALDESPINO and
BRENDA ROLON,
Plaintiffs,

v.

ALAMO HEIGHTS INDEPENDENT
SCHOOL DISTRICT, et al.,

Defendants.

Civil Action No. SA-95-CA-0817

ORDER

Pursuant to Federal Rule of Civil Procedure 52(a), the Court hereby enters its findings of fact and conclusions of law after trial before the Court.

The Plaintiffs in the present case challenge the at-large voting system for electing members of the school board for the Alamo Heights Independent School District (the "AHISD"). Plaintiffs contend that the current system dilutes the votes of politically cohesive Hispanics in the AHISD, in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq. and the Fourteenth and Fifteenth Amendments to the United States Constitution. After trial on the merits

from September 15 through September 19, 1997, the Court enters the following memorandum decision and order.

Discussion

"Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, ... district courts [must] explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning)." Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1203 (5th Cir.1989); quoting Velasquez v. City of Abilene, 725 F.2d 1017, 1020 (5th Cir.1984). The Fifth Circuit has emphasized that there is a "special need for detailed findings of fact in vote dilution cases." Westwego Citizens for Better Gov't v. Westwego, 872 F2d 1201, 1203 (5th Cir.1989); see also Overton v. City of Austin, 871 F.2d 529, 530-31 (5th Cir.1989) (the district court must perform a "searching and practical evaluation of 'past and present reality'"). In accordance with the requirements of Fed. R. Civ. P. 52(a) and the Fifth Circuit precedents, this court examines the applicable law and sets out its Findings of Fact and Conclusions of Law.

The fundamental question in this section 2 vote dilution case is whether, as a result of the at-large system for the AHISD school board elections, Hispanics in the AHISD "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." Thornberg v. Gingles, 478 U.S. 30, 44-45, 106 S. Ct. 2752, 2763, 92 L.Ed. 2d 25 (1986). In Gingles, the Supreme Court held that the use of at-large voting would not impede "the ability of minority voters to elect representatives of their choice" unless there is a white bloc voting majority that would "usually be able to defeat candidates supported by a politically cohesive,

geographically insular minority group." 478 U.S. at 47-48, 106 S.Ct. at 2765. In order to show that they cannot elect representatives of their choice, plaintiffs in a section 2 case must meet the Gingles three-part threshold test:

> [f]irst that the group is sufficiently large and geographically compact to constitute a majority in a single member district; second, that it is politically cohesive and third, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

Growe v. Emison, 507 U.S. 25, 39-41, 113 S. Ct. 1075, 1084, 122 L.Ed.2d 388 (1993); see also Gingles, 478 U.S. at 49-53, 106 S.Ct. at 2766-67; Clark v. Calhoun County, Miss., 88 F.3d 1393, 1395 (5th Cir. 1996).

With regard to the first Gingles factor, it is the burden of the Plaintiffs to establish that it is possible to create a districting plan such that at least one district has a majority of minority voting age citizens, and such that the sum of the deviation of the largest district from ideal and the smallest district from the ideal is less than ten percent. fn1. The majority of courts addressing this issue have held that a plaintiff must establish that it is possible to create a district with a majority of minority voting-age citizens. Campos v. Harris County, 113 F.3d 544, 547-48 (5th Cir. 1997); McNeil v. Springfield Park District, 851 F.2d 937, 944-45 (7th Cir.1988), cert denied 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989); Dickinson v. Indiana State Election Board, 933 F.2d 497, 503 (7th Cir.1991) ("a simple majority of eligible voters in the single-member district"); Romero v. City of Pomona, 665 F.Supp. 853, 854 (C.D.Cal.1987), aff'd, 883 F.2d 1418, 1425-26 (9th Cir. 1989) (stating that Gingles refers to effective voting majorities, rather than raw population totals, as

the touchstone for determining geographical compactness). See also Perez v. Pasadena Independent Sch. Dist., 958 F. Supp. 1196, 1210 (S.D.Tex. 1997) citing Garza v. County of Los Angeles, 918 F. 2d, 763, 785 (9th Cir. 1990) (Kozinski, J., concurring in part, dissenting in part), cert. denied, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991) citing Brown v. Thomson, 462 U.S. 835, 838-39, 103 S.Ct. 2690, 2694, 77 L.Ed.2d 214 (1983) (discussing 10% rule).

In deciding whether a sufficiently large and geographically compact majority-minority single-member district can be created to satisfy the first prong of Gingles, a court is not confined to United States census data. Kirkpatrick v. Preisler, 394 U.S. 526, 534-36, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519 (1969); Garza, 918 F.2d at 772-73; Dixon v. Hassler, 412 F.Supp. 1036, 1040 (W.D.Tenn.) aff'd, 429 US. 934, 97 S.Ct 346, 50 L.Ed2d 303 (1976); see also Westwego Citizens for Better Gov't v. City of Westwego, 906 F.2d 1042, 1045-46 n. 3 (5th Cir. 1990). Nevertheless, census figures are presumed accurate until proven otherwise. McNeil, 851 F.2d at 946. Proof of changed figures must be "thoroughly documented," have a high degree of accuracy, and be "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census. McNeil, 851 F.2d at 946; Kirkpatrick, 394 U.S. at 534-36, 89 S.Ct at 1231; Dixon, 412 F. Supp. at 1040; Graves v. Barnes, 446 F. Supp. 560, 568 (W.D.Tex. 1977), aff'd, 435 U.S. 901, 98 S.Ct. 1444, 55 L.Ed.2d 492 (1978). Federal census data must be used unless there is more reliable data. McNeil, 851 F.2d at 946; Skorepa, 723 F.Supp. at 1390. "Estimates based on past trends are generally not sufficient to override 'hard' decennial census data." McNeil, 851 F.2d at 946.

If the Gingles three-part threshold is met, Plaintiffs must then also show that under the "totality of the circumstances," Plaintiffs do not possess the same

opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters. Rollins v. Fort Bend Independent School District, 89 F.3d 1205 (5th Cir. 1996); Clark, 88 F.3d at 1396 ("it will be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of the circumstances"); LULAC v. Clements, 999 F.2d 831, 849 (5th Cir.1993) (en banc), cert. denied, 510 U.S. 1071, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994). To make this determination, a court must conduct a "searching practical evaluation" of the factors set forth in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir.1973) (en banc), aff'd sub. nom., East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), and in the Senate Report of the 1982 Amendments to the Act. If the Plaintiffs can meet this "totality of the circumstances" test, and can successfully establish the three Gingles preconditions, then they are entitled to prevail.

The Plaintiffs have presented the Court with three proposed plans for redistricting: Plan J-552, Plan J-696, and Plan J-557. The first two of these plans utilize the same exact district; the third of these plans contains all of the district contained in the first two plans, plus a small extension northward (the "northward expansion").fn2

The Plaintiffs introduced evidence that 85.36% of voting-age Hispanics in San Antonio are citizens eligible to vote. See Plaintiffs' Exhibit 1-a. The Plaintiffs also introduced evidence that 89% of the voting-age Hispanics are eligible to vote, and it appears that the Defendants used that number in their calculations.

Findings of Fact

1. 89% of the voting-age Hispanics are citizens eligible to vote.

2. According to the 1990 census figures, there were 3,541 persons in the district proposed by Plan J-552 and Plan J-696. The district contained 2,217 persons identified as Hispanic, and of this group, 1,424 were of voting age, and 1,267 were citizens eligible to vote. The proposed district contained 1,029 non-Hispanic citizens of voting age. See Plaintiffs' Exhibits "1-a," "1-e," and "63."

3. According to the 1990 census figures, the population of the district proposed by Plan J-557 contained 3,667 persons; of these, it appears that 2,184 were of Hispanic origin, 1,474 were Hispanic of voting age, and the Court calculates that 1.312 were Hispanic citizens of voting age. The proposed district also contained approximately 2,557 voters, so Hispanics accounted for approximately 51.3 percent of the voters in this district.fn3

4. It is undisputed that using the 1990 census data, it is feasible to draw a redistricting plan that satisfied the first Gingles requirement. See Plaintiffs' Exhibits 1-a - 1-c.

5. The Defendants' expert on demography, Dr. Bill Rives, extensively analyzed the population trends in the AHISD and produced a report in April of 1997.fn4

6. In the April Report, Dr. Rives found that the overall population of Alamo Heights had experienced a gain of approximately 1,648 people (making the overall population 27,457 persons, and the ideal district 3,922 persons), but that the districts proposed in plans J-552 and J-696 had experienced a net loss of 128 persons.fn5

7. In the April Report, Dr. Rives also found that the Hispanic citizen voting age population for the proposed districts had declined by approximately 59 people, and that the non-Hispanic citizen voting age population had increased in these districts by 151 people.

8. The April Report does not directly address Plan J-557, except to note that there was no post-census gain in the northward expansion area. The April Report does, however, state that expanding the district proposed in plans J-552 and J-696 will destroy the Hispanic majority enjoyed by the district, and thus indirectly addresses the likely effect of the "northward expansion" contemplated in Plan J-557.

9. The April Report is thoroughly documented, has a high degree of accuracy, and is clear, cogent, and convincing enough to override the presumptive correctness of the prior decennial census. McNeil, 851 F.2d at 946; Kirkpatrick, 394 U.S. at 534-36, 89 S.Ct. at 1231; Dixon, 412 F.Supp. at 1040; Graves v. Barnes 446 F.Supp. 560, 568 (W.D.Tex.1977), aff'd, 435 U.S. 901, 98 S. Ct. 1444, 55 L.Ed.2d 492 (1978).

10. Using the April Report's figures, the districts proposed by Plans J-552 and J-696 have suffered a net loss of 128 persons, leaving these districts with an overall population size of 3,413 people. This number deviates from the ideal district by 509 people, or 12.9%.

11. Using the April Report's numbers, the district proposed by Plan J-557 has similarly suffered a loss of 128 persons, leaving this district with an overall population of 3,539. This number deviates from the ideal by 383 people, or 9.7%.

12. Using the April report's numbers, the district proposed by Plan J-557 has lost approximately 59 Hispanic voters, but the non-Hispanic voting population has increased by 151 voters.fn6 In terms of raw numbers, this means that the district proposed by Plan J-557 contained 1,253 Hispanic voters out of a total of 2,607 voters --or, in other words, Hispanics constitute only 48% of the voting population.fn7

13. The April Report's numbers reflect the demographic reality of Alamo Heights.

14. The Plaintiffs were not able to introduce any demographic studies to contradict the report of Dr. Rives. However, the Plaintiffs did attempt to introduce a demographic study that Mr. George Korbel, the Plaintiffs' expert, completed two days before trial, but the Court refused to allow this study to come in because it unfairly surprised the Defendants. fn8 See Local Rule CV-16(e) ("Supplementation, regarding substance and

timeliness, may be permitted by the Court upon a showing of good cause.")

15. The Court makes no findings with regard to the other Gingles factors or Zimmer factors, because the Plaintiffs cannot satisfy the first of the Gingles requirements.

16. Any findings of fact above should be construed as conclusions of law to the extent necessary.

Conclusions of Law

1. It is the burden of the Plaintiffs to establish that it is possible to create a districting plan such that at least one district has a majority of minority voting age citizens, and such that the sum of the deviation of the largest district from ideal and the smallest district from the ideal is less than 10 percent.

2. A court is not confined to United States census data in deciding whether a sufficiently large and geographically compact majority-minority single-member district can be created to satisfy the first prong of Gingles. Nevertheless, census figures are presumed accurate until proven otherwise. McNeil, 851 F.2d at 946. Proof of changed figures must be "thoroughly documented," have a high degree of accuracy, and be "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census.

3. Because the Court has found that the April Report of Dr. Rives is thoroughly documented, has a high

degree of accuracy, and is clear, cogent, and convincing, the Court will accept the adjustments made by the April Report to the 1990 Census figures.

4. The district proposed by Plan J-552 and J-696 contains insufficient population to satisfy the first Gingles requirement.

5. The district proposed by Plan J-557 does not contain a majority of Hispanics among its citizen-age voting population, and therefore, does not satisfy the first Gingles requirement.

6. The Plaintiffs have not established by a preponderance of the evidence that they can draw a district that satisfies the first requirement of Gingles, and therefore, their claim under Section 2 of the Voting Rights Act must fail.

7. There is insufficient evidence of intentional discrimination against minorities in the AHISD school board elections. Therefore, on the present record, the Court does not find discriminatory intent in violation of the Fourteenth or Fifteenth Amendments to the United States Constitution.

8. Any conclusions of law above should be construed as findings of fact to the extent necessary.

CONCLUSION

Plaintiffs' theory of this case is that the current at-large election system and white bloc voting prevent minority candidates from being elected to the board of

trustees of the AHISD. Plaintiffs have not proven that it is possible to create a single-member district in which the majority of voting-age citizens are Hispanic. Because Plaintiffs have not met the "necessary preconditions[]" set out in Gingles, 478 U.S. at 49-51, 106 S.Ct. at 2766, this court must find in favor of Defendants.

Accordingly, it is hereby ORDERED that all of the Plaintiffs' claims for relief are DENIED, and that the JUDGMENT be entered for the Defendants and against the Plaintiffs. It is further ORDERED that all motions in the present case are DENIED as MOOT.

SIGNED and ENTERED this 3rd of February 1998.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

Footnotes

fn1An ideal district is determined by dividing the overall population by the number of districts to be created. Thus, in a city with 90,000 people and nine districts, an ideal district would contain 10,000 people.

fn2The Plaintiffs also presented this Court with two other plans-- J-551 and J-559. Both of these plans offer districts that are even smaller than the ones offered by the other proposals. For the reasons described herein, neither of these plans will satisfy the Gingles requirements, and therefore the Court will not make detailed findings of fact with regard to

J-551 or J-559. The Plaintiffs at trial also made a proffer with regard to a "southern expansion." For the reasons described below, the Court will not consider this additional plan.

fn3This number was derived from the percentages of citizens per ethnic group, given in Plaintiffs' Ex. 1-a, and the population breakdown of the proposed district, given in Plaintiffs' Ex. 1-c. Thus, of the 103 African Americans living in the district in 1990, approximately 102 were citzens; similarly, of the 30 people of "other" ethnic background, 24 were citizens. Adding 1,312, 102, 30, and 1,119 (the number of Anglo voters), the Court reaches the 2,557 value.

fn4Dr. Rives also produced a report in August of 1997 (the "August Report.") In that Report, Dr. Rives found that the overall population of the district proposed by Plan J-552 and J-696 has lost 140 people, while the overall population of Alamo Heights has increased by 3,133 people. Dr. Rives also found that the Hispanic voting age population has declined by 48 people, and that the non-Hispanic voting age population has risen by 113 people. The August Report does not directly address Plan J-557, except to note that there was no post-census gain in the northward expansion area. The August Report does, however, state that expanding the district proposed in plans J-552 and J-696 will destroy the Hispanic majority enjoyed by the district, and thus indirectly addresses the likely effect of the "northward expansion" contemplated in Plan J-557. The Plaintiffs complain that the August Report was delivered so late that the Plaintiffs did not have time to prepare a valid defense against it. See, Transcript, September 15, 1997 at approx 9:36 a.m. To take the approach most favorable to the Plaintiffs, the Court therefore will only consider the analysis contained in Dr. Rives's April Report. See Local Rule CV-16.

fn5 This loss in population was found, in large part, to be caused by the renovation of a large apartment complex contained in the area. The complex originally had 643 residents; it reopened with only 329 residents, and the proposed districts gained 186 residents from post-census growth. On cross examination, Dr Rives admitted that, using a different methodology, he had originally computed the apartment complex to have only 591 residents; however, Dr. Rives testified credibly as to his reasons for abandoning that methodology. See also Defendant's Response to Plaintiffs' Motion for Summary Judgment, filed November 25, 1996, at 2, n.1.

fn6 As the Court noted previously, no party has given the Court any information with regard to the ethnic make-up of the northward expansion zone of Plan J-557. As a result, the Court simply declines to speculate as to what the racial mix is of the families contained in the expansion zone.

fn7It is interesting to note in passing that Dr. Rives's reports predicted that expanding to the north would upset the fragile Hispanic voter majority, but Dr. Rives never explicitly considered Plan J-557. Obviously, Dr. Rives's testimony is bolstered by the fact that his predictions seemingly have proven accurate.

fn8 Moreover, the Court also would need to exclude the proffered evidence on grounds that it is neither "thoroughly documented," nor does it have a high degree of accuracy, nor is it "clear, cogent and convincing" to override the presumptive correctness of the prior decennial census. McNeil, 851 F.2d at 946; Kirkpatrick, 394 U.S. at 534-36, 89 S.Ct. at 1231; Dixon, 412 F.Supp. at 1040; Graves v Barnes, 446 F.Supp. 560, 568 (W.D.Tex.1977). aff'd, 435 U.S. 901,

98 S.Ct. 1444, 55 L.Ed.2d 492 (1978). Mr. Korbel himself admits in his proffer that the methodology of his survey required that all homes be visited at least twice before neighbor attribution was attempted, and that he did not follow that methodology (Affidavit of Mr. Korbel at 4.). Mr. Korbel also admits that usually a survey of this type takes several weeks to develop, survey, return, verify, and analyze, but that this process was "truncated." In short, even if there were no undue surprise, the Court would not accept these survey results.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT VALDESPINO and
BRENDA ROLON,
Plaintiffs,

v.

ALAMO HEIGHTS INDEPENDENT
SCHOOL DISTRICT, et al.,
Defendants.

Civil Action No. SA-95-CA-0817

JUDGMENT

In accordance with the Order entered by this Court on this same date, it is hereby ORDERED, ADJUDGED AND DECREED that JUDGMENT is GRANTED against the Plaintiffs and in favor of the Defendant.

It is further ORDERED, ADJUDGED AND DECREED that all pending motions in this case are DENIED AS MOOT

SIGNED and ENTERED this 3rd day of February 1998.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

ENFORCEMENT OF VOTING RIGHTS

(Section Two of the Voting Rights Act)

42 U.S.C. Sec. 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Supreme Court, U.S.
FILED
JUL 12 1999
OFFICE OF THE CLERK

(2)

No. 98-1987

In The
Supreme Court of the United States

ROBERT VALDESPINO; BRENDA ROLON,

Petitioners,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED

1. Should this Court alter the threshold test it adopted in *Thornburg v. Gingles* to recognize a claim that a plaintiff group's ability to elect is diluted even though the group is not sufficiently large and geographically compact such that it can constitute a majority in a single-member district?

2. Are the unanimous opinions of the four courts of appeals that have addressed the issue incorrect in determining that the *Thornburg v. Gingles* threshold analysis of whether a group can constitute a majority in a single-member district should be limited to consideration of the universe of persons potentially eligible to vote – *i.e.*, to the citizen-voting-age population?

3. Is it an appropriate exercise of this Court's jurisdiction to resolve factual disputes under a legal standard that is not significantly disputed?

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BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to review the Fifth Circuit's decision and opinion in *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999).

STATEMENT OF THE CASE

The Statement of the Case presented by the plaintiffs[1] is generally correct, although incomplete. Only when read in conjunction with the factual discussion found in the Fifth Circuit's opinion does the plaintiffs' Statement of the Case provide a summary of the relevant facts.

Alamo Heights[2] does object to the plaintiffs' references to "admittedly wrong population projections" and "admittedly erroneous population projections" found on page three of the Petition. These references erroneously suggest that Dr. Rives, the demographic expert witness presented by Alamo Heights, admitted that his report, which the district court relied on as the basis for its

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[1] The petitioners/plaintiffs in this case are Robert Valdespino and his wife, Brenda Rolon. For ease of reference, they will be referred to in this brief in opposition as "plaintiffs."

[2] The respondents/defendants in this case are the Alamo Heights Independent School District and the seven members of its board of trustees. They will be referred to in this brief in opposition as "Alamo Heights."

findings, was incorrect. No such admission occurred. Furthermore, the Fifth Circuit explicitly rejected the plaintiffs' claim on this point as "overstated."[3] Dr. Rives prepared a report in April 1997 that was based on Alamo Heights apartment occupancy data available at that time. In late July, more recent data became available to the parties, and Dr. Rives updated his report with the new data. He also corrected a computation error in the earlier report. During the trial of the case, the plaintiffs claimed surprise because they received the August report a little more than a month before the beginning of the trial. Accordingly, the district court, "to take the approach most favorable to the Plaintiffs," limited its consideration to the April report.[4] Thus, the use of the so-called "admittedly wrong" report was simply a function of the district court's acceding to the plaintiffs' request that it rely on the report that was prepared with slightly less current data. Further, as the Fifth Circuit recognized, it made no difference which report was used, because the underlying conclusion in both was the same: the plaintiffs could not constitute a majority and thus failed to satisfy the *Thornburg v. Gingles* threshold inquiry.[5]

SUMMARY OF ARGUMENT

The plaintiffs cite several reasons why the Court should grant their Petition for a Writ of Certiorari and

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[3] App. at 11a.

[4] App. at 30a n.4.

[5] *Id.* at 11a.

review the opinion of the Fifth Circuit. None of their arguments merit this Court's attention.

First, the plaintiffs contend that the Fifth Circuit misapplied this Court's vote dilution jurisprudence under *Thornburg v. Gingles*.[6] The Fifth Circuit's opinion, however, is a textbook example of *Gingles* analysis. In *Gingles*, the Court imposed a threshold requirement on plaintiffs bringing vote dilution claims under section 2 of the Voting Rights Act. The first prong of the requirement is that the group represented by the plaintiffs be capable of constituting a majority in a single-member district. The purpose of the threshold majority requirement is to establish a causal relationship between the plaintiffs' alleged vote dilution injury and the use of the challenged at-large election system. Under this Court's well-established jurisprudence, plaintiffs cannot bring a *Gingles* "ability-to-elect" claim absent a threshold showing that they can constitute a majority. These plaintiffs brought a *Gingles* ability-to-elect claim, but they were unable to meet the *Gingles* threshold majority test. The Fifth Circuit properly applied this Court's vote dilution precedents and rejected the plaintiffs' claim.

Second, the plaintiffs contend that the Fifth Circuit erred in considering citizenship when determining if Hispanics could constitute a majority in a single-member district. Although this Court has never explicitly ruled on this issue, the Fifth Circuit's approach is entirely consistent with both Congressional intent in enacting the Voting Rights Act and with this Court's voting rights cases. The

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[6] 478 U.S. 30 (1986).

Voting Rights Act extends its protections only to citizens. The *Gingles* threshold test is designed to measure potential *voting* strength – a benchmark that necessarily requires consideration of citizenship, since only citizens can vote. Furthermore, the Fifth Circuit is not alone in reaching this conclusion. All of the circuits to address this issue – the Fifth, Seventh, Ninth, and Eleventh Circuits – have concluded that citizenship is a proper part of the *Gingles* threshold analysis. The circuits are unanimous, and legally correct, in their reasoning. There is no split to resolve, nor any misapplication of precedent for this Court to address.

The plaintiffs seek to obtain an evidentiary, case-specific ruling from this Court concerning the methodology used by Alamo Heights' demographic expert. This is not an issue that merits this Court's attention. The plaintiffs object to the expert's reliance on evidence of post-census changes in the Alamo Heights population in the period after the 1990 census and up until trial. The plaintiffs do not dispute that use of post-census figures is permissible in appropriate cases, and they do not truly challenge the substantive legal standard applied by the district court or the Fifth Circuit in making that evidentiary call. They simply object to the evidentiary result. The plaintiffs' fact-based objections are unfounded; however, even assuming their objections had merit, this case-specific quarrel over the weight of the evidence is not appropriate for resolution by this Court, and comes nowhere near any of the standards articulated in Supreme Court Rule 10(a).

In short, the plaintiffs present no legal questions that merit a grant of certiorari. The central issue in this case –

the standard for ability-to-elect claims under *Gingles* – is controlled by well-settled precedent from this Court. The Fifth Circuit decided the tangential issue of use of citizenship within the *Gingles* test in precisely the same manner as all the other federal courts of appeal that have addressed the issue. That decision is entirely consistent with this Court's jurisprudence and Congressional intent. Finally, the purely evidentiary issue of the propriety of relying on post-census data, given changes in the Alamo Heights population since 1990 and up until trial, is a fact question confined to the parameters of this particular case. None of these issues merit the Court's attention. The Petition should be denied.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit properly applied the *Gingles* threshold requirement that a plaintiff group be able to show that it can constitute a majority in a single-member district.

This Court, in *Thornburg v. Gingles*,[7] set out three necessary preconditions that plaintiffs must meet in a suit brought under section 2 of the Voting Rights Act[8] before they can establish that an at-large election system results in vote dilution. The first necessary precondition is that "the minority group must be able to demonstrate that it is

[7] 478 U.S. 30 (1986).

[8] 42 U.S.C. § 1973.

sufficiently large and geographically compact to constitute a majority in a single-member district."[9] In the Petition for Writ of Certiorari, the plaintiffs primarily complain that the district court and Fifth Circuit were "inflexible" in applying this first prong of the *Gingles* threshold analysis. Their specific objections are: (1) a plaintiff group should not be held to a "bright-line" test requiring it to constitute 50 percent of the relevant population of a putative district, so long as it can show that it has the potential to elect candidates of its choice in the district; and (2) citizenship should not be considered when determining if the group is sufficiently large to constitute a majority. The Court should decline the invitation to consider either facet of plaintiffs' claim.

A. The *Gingles* test is conducted in two phases, and a plaintiff must satisfy the threshold majority requirement before the court conducts its functional and searching review of the totality of the circumstances.

Plaintiffs complain that the Fifth Circuit rejected this Court's and Congress' command to employ a "searching, functional, and comprehensive" analysis and instead established a "mechanical, unbending 'bright-line' test."[10] Alamo Heights does not dispute that Congress and this Court have mandated that a section 2 analysis be searching and functional.[11] *Gingles*, however, provides a

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[9] *Gingles*, 478 U.S. at 50.

[10] Pet. at 10.

[11] *Gingles*, 478 U.S. at 45.

specific structure for that searching and functional analysis.[12] Before looking to the totality of the circumstances and performing the comprehensive analysis demanded by the Voting Rights Act, a court must first find that the plaintiff has satisfied the threshold standard necessary to bring a section 2 case. A threshold standard, by its very nature, provides an objective, fixed measure.[13] Once the threshold standard or necessary precondition is satisfied, then, and only then, does the court perform its more comprehensive and searching analysis. There is nothing about the district court's or the Fifth Circuit's decisions in this case that is inconsistent with the requirement that the section 2 analysis be searching, functional, or comprehensive. To the contrary, these courts performed the analysis in precisely the manner mandated by this Court, ensuring that the plaintiffs met the necessary preconditions for a section 2 claim before proceeding further.

B. To pass the *Gingles* threshold, the plaintiff group must be able to establish that its injury is caused by the use of the at-large election structure; it makes this showing by demonstrating that it can constitute a numerical majority in a putative single-member district.

The district court and the Fifth Circuit properly applied the *Gingles* requirement that the plaintiff group be able to establish that it can constitute a majority in a putative single-member district. Only by making this

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[12] *Johnson v. DeGrandy*, 512 U.S. 997, 1010 (1994).

[13] *Holder v. Hall*, 512 U.S. 874, 889 (1994) (O'Connor, J., concurring).

threshold showing does a plaintiff group establish its potential to elect candidates in the absence of the at-large system and, thus, raise the possibility that its vote dilution injury is caused by the use of the at-large system.[14] In fashioning this threshold requirement in *Gingles*, the Supreme Court,[15] the district court that originally considered the case,[16] and the commentators on whom the Supreme Court relied for much of the test,[17] all focused on the ability of members of the racial minority group to constitute a majority if a single-member district were drawn. None suggested, as the plaintiffs do here, that a

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[14] *Gingles*, 478 U.S. at 50-51 n.17.

[15] *Id.*

[16] *Gingles v. Edmisten*, 590 F. Supp. 345, 381 n.3 (1984), *aff'd in relevant part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986) ("[N]o aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority.").

[17] James Blacksher & Larry Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L. J. 1, 55 (1982) ("[M]inority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters") *quoted in Gingles*, 478 U.S. at 51 n.17. Blacksher and Menefee also illustrated the requirement that the majority be composed entirely of members of the plaintiff group, rather than made up of a coalition including cross-over voters, when they cited an example from a Dallas, Texas, case in which Hispanic voters were unable to state a claim because they could not constitute a majority in a single-member district and thus "could not be assured of having their choices succeed *solely* on the weight of their ballots," even though they were successful at coalition politics. Blacksher & Menefee, *supra* at 58-59 n.339 (emphasis added).

racial minority group could satisfy the threshold requirement with less than a majority.

"Majority" has a precise numerical meaning – namely, more than 50 percent. In choosing a "majority" standard, the Court determined that ability-to-elect claims would be justiciable when a group could exceed fifty percent in a putative district. The Court has never indicated that a cognizable claim exists when a group constitutes less than a majority, but is able to exert its will through coalition politics.[18] An objectively defined standard for justiciability like the *Gingles* threshold requirement is crucial in cases arising from the "political thicket" surrounding districting issues. It permits courts to exercise jurisdiction over cases in which vote dilution is a product of the structure of the election system, but not over cases in which the alleged dilution is the product of politics or other factors not appropriate for judicial resolution.

In *Gingles*, this Court firmly established that the first prong of the threshold test requires a numerical majority when it recognized the existence of an "ability-to-elect claim" and distinguished it from a hypothetical "ability-to-influence claim."[19] In an ability-to-elect claim, which is the cause of action the plaintiffs pled and tried, the racial minority group must establish that it can constitute a majority in a single-member district. By contrast, where the allegation is that the group is not a majority that can independently control the electoral outcome, but rather is

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[18] *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998).

[19] *Gingles*, 478 U.S. at 46 n.12.

a substantial minority that can elect the candidates of its choice with cross-over support from white voters, the claim is characterized as an ability-to-influence claim.[20]

The plaintiffs have never suggested that they are bringing an ability-to-influence claim. This is not surprising since this Court has merely assumed, but never decided, that such a claim exists,[21] and the two circuits that have considered the issue have both rejected the existence of an influence claim.[22] The plaintiffs made a strategic litigation choice in the district court and circumvented the uncertainty of an ability-to-influence claim by pleading and trying an ability-to-elect claim. Now, they apparently seek to circumvent the clearly established majority threshold requirement of an ability-to-elect claim by suggesting in this Court that ability-to-influence principles be imported into the *Gingles* test for an ability-to-elect claim. The new, hybrid standard they promote is unprecedented in this Court or any federal court of appeals. The Fifth Circuit correctly applied *Gingles* and its progeny. There is no reason for this Court to overrule

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[20] *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming, *arguendo*, that an "influence-dilution claim" was actionable and stating: "The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority.").

[21] *Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994); *Voinovich*, 507 U.S. 146 at 154; *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993); *Gingles*, 478 U.S. at 46 n.12.

[22] *Cousin*, 145 F.3d at 828; *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988).

Gingles and create the hybrid standard urged by the plaintiffs.

C. There is no reason to revisit the issue of whether citizenship should be considered when determining the first prong of the *Gingles* threshold analysis.

After *Gingles* was decided, courts faced the issue of whether the majority requirement in the first prong of the analysis was to be evaluated on the basis of population or of voting-age population. As the Fifth Circuit reasoned:

> The *raison d'etre* of *Thornburg* and of amended § 2 is to facilitate the participation by minorities in our political processes, by preventing dilution of their votes. Only voting age persons can vote.[23]

Similarly, only citizens may vote. If the *Gingles* threshold test is designed to measure voting potential, it is necessary to apply it to the potential *voting* population – *i.e.*, voting age citizens. This approach is consistent with the Congressional intent, since the Voting Rights Act expressly limits its protection to citizens.[24]

Citizenship is not an issue in every case, since it becomes relevant only when there is a significant difference between the citizenship percentage of the majority group and that of the minority group. However, every circuit, when the issue has arisen, has determined that

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[23] *Brewer v. Ham*, 876 F.2d 448, 452 (1989).

[24] 42 U.S.C. §§ 1973(a) and (b).

citizenship is an appropriate part of the *Gingles* threshold analysis.[25]

There is no reason for this Court to reexamine an issue on which the federal appellate courts universally agree and on which their reasoning is clearly correct.

D. The Fifth Circuit did not create a "new rule" that limits or restricts plaintiffs from bringing claims under section 2 of the Voting Rights Act.

Contrary to the plaintiffs' allegations, the Fifth Circuit has not created a new rule or "foreclosed an important cause of action under Section 2 of the Voting Rights Act to Hispanic citizens."[26] The rule applied by the Fifth Circuit is this Court's rule in *Gingles* – *i.e.*, that a plaintiff group must be large enough to constitute a majority in a single-member district. Undoubtedly, there will be instances in which minority groups – Hispanic or otherwise – will be precluded from pursuing a claim because their members are not sufficiently numerous or geographically compact so as to be able to constitute a majority in a single-member district. That, however, is the nature of a threshold test and has been the case since the *Gingles* necessary preconditions were announced in 1986. The plaintiffs here could not meet the *Gingles* majority

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[25] *See, Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989), *abrogated on other grounds, Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc).

[26] Pet. at 8.

requirement; however, groups in other communities have satisfied the requirement and will continue to do so.

Nor will concerns about the accuracy of census citizenship data and the timing of its release preclude relief to voting rights plaintiffs.[27] Certainly, as the plaintiffs have observed, citizenship data released by the census provide only a "snap-shot view of citizenship levels in 1990, and thus does not take into account changes in citizenship levels since 1990. . . . "[28] However, voting rights plaintiffs who believe that citizenship data are inaccurate because of timing or other reasons can offer evidence indicating the need to depart from census citizenship numbers, just as Alamo Heights offered evidence that clearly convinced the district court to depart from outdated 1990 census population figures in favor of more recent and more accurate numbers.

Plaintiffs set forth a "parade of horribles" that they envision will flow from the Fifth Circuit's decision. That decision, however, is a routine application of *Gingles*, and the "horribles" identified by plaintiffs are the standard hurdles faced by any voting rights plaintiff, or defendant, who litigates a section 2 case. The Fifth Circuit has followed well-established voting rights jurisprudence, and its decision produces both the same barriers and the same opportunities for voting rights plaintiffs that exist under the case law of the other federal circuits and of this Court.

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[27] Pet. at 7.

[28] *Id.*

II. The Petitioners claim that the Fifth Circuit decision conflicts with opinions of this Court or of other circuits is wholly without merit.

A. The Fifth Circuit's opinion is entirely consistent with this Court's jurisprudence.

The plaintiffs complain that the Fifth Circuit's "mechanical, unbending 'bright-line' test for evaluating the *Gingles I* threshold factor is inconsistent with the teachings of this Court. . . . "[29] The primary authority for this statement is the broad admonition in *Voinovich v. Quilter*[30] that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."[31] The key to the statement, however, is the Court's reference to "the nature of the claim." The claim in *Voinovich* was a hypothetical ability-to-influence claim. By contrast, the *Gingles* requirement that a plaintiff group be able to constitute a majority in a putative single-member district arose in the context of an ability-to-elect claim, which is the type of claim plaintiffs brought here. If a voting rights plaintiff brings an ability-to-influence claim – the type of claim at issue in *Voinovich* – then a modification to the *Gingles* threshold is required. Because plaintiffs here did not assert an ability-to-influence claim, there was no need for the Fifth Circuit to make a modification. The Fifth Circuit applied classic ability-to-elect analysis to plaintiffs' classic ability-to-elect claim.

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[29] Pet. at 10.

[30] 507 U.S. 146, 158 (1993).

[31] *Id.*

Although plaintiffs also cite *Bush v. Vera*[32] for the proposition that "the complexity of the districting process [is] such that bright-line rules are not available,"[33] they quote *Bush* out of context. From the rest of the quoted sentence from *Bush*, it is evident that the Court was discussing the interaction between the districting process and the relatively recent *Shaw v. Reno*[34] jurisprudence. *Bush*'s statement about a specific *Shaw v. Reno* issue cannot be transformed into a blanket conclusion that bright-line rules do not apply to the *Gingles* threshold analysis.

The Fifth Circuit carefully and correctly applied this Court's jurisprudence to the issue plaintiffs presented. There is no reason for the Court to grant the petition.

B. The circuit conflicts claimed by the petitioners do not exist.

The plaintiffs claim that four cases are in conflict with the Fifth Circuit's opinion.[35] Although plaintiffs attempt to manufacture conflicts from quotations taken out of context, discussions of issues irrelevant to the issues in this case, and dictum in a concurring opinion, an examination of each of the four cases reveals that no conflicts in fact exist.

Solomon v. Liberty County – Eleventh Circuit – The plaintiffs claim the Eleventh Circuit's en banc decision in

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[32] 517 U.S. 952, ___, 116 S. Ct. 1941, 1964 (1996).

[33] Pet. at 10.

[34] 509 U.S. 630 (1993).

[35] Pet. at 10-11.

Solomon v. Liberty County[36] is in conflict with the Fifth Circuit's decision. Specifically, they assert that the "en banc court . . . determined that . . . a minority group that cannot establish that it is an absolute majority of a single-member district may still bring an action under the Voting Rights Act so long as it can demonstrate that it has the potential to elect in its demonstration district."[37] The plaintiffs, however, misrepresent what the Eleventh Circuit decided.

First, it is simply wrong to say that the Eleventh Circuit adopted this position. The en banc court in *Solomon* was equally divided 5-5. The passage that the plaintiffs cite comes from a specially concurring opinion in which less than a majority of the court joined. Second, the statement that the plaintiffs rely on is dictum. The Eleventh Circuit was never called upon to decide whether the first prong of the *Gingles* analysis could be satisfied even though the plaintiff group could not constitute an absolute majority of a single-member district. In fact, it was undisputed in that case that the plaintiffs made up a majority of the voting age population of a potential district.[38]

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[36] *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (en banc).

[37] Pet. at 10-11. Although the petition quotes from *Solomon*, it does not give the page number where the quotation can be found. The quotation appears in footnote 7 on page 1018.

[38] *Solomon*, 899 F.2d at 1013 (per curiam); *id.* at 1018 (Kravitch, J., specially concurring) ("[T]he undisputed evidence shows that blacks would constitute a majority of District 1's voting age population.").

Sanchez v. State of Colorado – Tenth Circuit – The alleged *Sanchez*[39] conflict arises not from any inconsistency with the Fifth Circuit's opinion, but from a purported clash between the *plaintiffs'* own argument that the Fifth Circuit employed a "rigid approach" to the *Gingles* analysis, whereas the Tenth Circuit observed that "the Circuits have been flexible in assessing the showing made for [the first *Gingles*] precondition."[40] In other words, plaintiffs cite the language used by the Tenth Circuit in contrast to their *own* characterization of the Fifth Circuit's analysis as "rigid." No conflict within the contemplation of Rule 10(a) exists between the Fifth and Tenth Circuits.[41] Furthermore, the Tenth Circuit's language concerning flexibility does not even relate to the issue before the Fifth Circuit. *Sanchez* discussed the need to be flexible when determining if a proposed district was *compact*.[42] By contrast, the issue the Fifth Circuit faced was whether the plaintiff group constitutes a *majority*. Compactness was never an issue.

Uno v. City of Holyoke – First Circuit – The plaintiffs claim that *Uno*[43] conflicts with the Fifth Circuit opinion because "the court approved a finding that plaintiffs had met the *Gingles I* requirement by producing an Hispanic majority voting age population district and by showing

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[39] *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996).

[40] Pet. 10 (quoting *Sanchez*, 97 F.3d at 1311).

[41] SUP. CT. RULE 10(a).

[42] *Sanchez*, 97 F.3d at 1311-12, 1314-15.

[43] *Uno v. City of Holyoke*, 72 F.3d 973 (1st Cir. 1995).

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that such district consistently elected Hispanic candidates."[44] There is nothing in either the First Circuit's opinion, or the *Uno* district court opinion, to suggest more flexibility in the analysis of the majority requirement than that applied by the Fifth Circuit, or, for that matter, any difference at all in the way the First and Fifth Circuits interpreted the first prong of the *Gingles* threshold analysis. The *Uno* plaintiffs constituted far more than a majority, and they did so in a much larger area than a single-member district.[45] There was no question that the *Uno* plaintiffs met the majority threshold requirement. The district court in *Uno* expressly noted that the first prong of *Gingles* was "not vigorously disputed" and that the issue was "academic."[46]

King v. State Board of Elections – Northern District of Illinois (three-judge court) – The plaintiffs claim a conflict with *King v. State Board of Elections*[47] because that case "specifically rejected the use of citizen-voting-age population as the *exclusive* measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor."[48] First, the *King* opinion was vacated by this Court, so it no longer has any viability and thus could not form the basis for any conflict.[49] Second, the *King* court did not reject the use of citizen-voting-age population as an appropriate

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[44] Pet. at 11.

[45] *Uno v. City of Holyoke*, 880 F. Supp. 911, 919 (D. Mass.), *vacated on other grounds*, 72 F.3d 973 (1st Cir. 1995).

[46] *Id.* at 925.

[47] 979 F. Supp. 582 (N.D. Ill. 1996) (three-judge court).

[48] Pet. at 11.

[49] *King v. Illinois Board of Elections*, 519 U.S. 978 (1996).

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measure. Instead, it expressly declined to reach that issue.[50] What *King* did reject was the citizenship population numbers produced by an expert witness who testified that Hispanic citizenship rates were much lower than those shown by the census.[51] This evidentiary ruling, premised on a determination about the credibility of a particular witness, hardly creates a circuit conflict on an unaddressed issue of law. Third, even if *King* were still viable and even if it did hold what the plaintiffs suggest, it could not create a conflict among the "circuits," since it is a decision from a district court. More important, if *King*'s holding were as broad as the plaintiffs contend, it would be contrary to the law of its own circuit – the Seventh Circuit – which, like the Fifth Circuit, now recognizes citizen-voting-age population as the relevant *Gingles* measure.[52]

Even the most cursory review of *Solomon*, *Sanchez*, *Uno*, and *King* reveals that no circuit conflicts exist, and thus there is nothing for this Court to resolve.

III. Plaintiffs' arguments regarding the use of post-census population data merely reflect disagreements with the district court's fact-findings and do not present legal questions that require resolution by this Court.

The core issue at trial was the current population of the Alamo Heights school district. Two especially

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[50] *King*, 979 F. Supp. at 612.

[51] *Id.* at 612 n.58.

[52] *Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998).

significant changes had occurred since the 1990 census was taken. First, an apartment complex, which had accounted for about eighteen percent of the population of the plaintiffs' proposed single-member district, closed. It was extensively remodeled and, after reopening, attracted a tenant base with a much smaller average number of persons per household. As a result, its population was less than half of the 1990 population of the complex. It also had a significantly lower percentage of Hispanic residents in 1997 than it did in 1990. During the same time, there was extensive development on a large tract of land elsewhere in the school district. As a result of these two events, the population required for a single-member district increased, while the population of the district proposed by the plaintiffs both decreased and became less Hispanic. Although these two events were the most significant demographic changes in the school district, Alamo Heights submitted expert analysis designed to reflect *all* population changes in the district. As a result of this testimony, the district court found that it was no longer possible to draw a single-member district with an Hispanic citizen-voting-age population majority.[53]

The plaintiffs recognize that there are times when courts, including this Court, have found that it is appropriate to rely on post-census population adjustments.[54] There even appears to be no substantive disagreement about the legal test employed by the district court. As the Fifth Circuit pointed out:

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[53] App. at 28a.

[54] Pet. at 14-17.

> Except for a cavil, the parties and the district court essentially agree about what standard should be required to overcome census data. As the district court summarized it:
>
> > Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census.[55]

The root of the plaintiffs' contention is that the Fifth Circuit, and presumably the district court, acted "cavalierly" in applying the legal standards to the facts of this case.[56] The centerpiece of their demographic argument is a laundry list of complaints about the expert's analysis and the data on which he relied.[57] Essentially, the plaintiffs disagree with the methodology used by Alamo Heights' demographer and with the particular facts found by the district court.

These fact-based arguments were addressed by the Fifth Circuit and found to be "generally misdirected, exaggerations of hypothetical problems, based upon criticisms of assumptions that played no role in [the demographer's] methodology, or based on the analysis in [the] superseded 1995 reports."[58] Alamo Heights, like the Fifth Circuit, does not believe the plaintiffs accurately and

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[55] App. at 10a (footnote omitted).

[56] Pet. at 17.

[57] *Id.* at 19-23.

[58] App. at 11a.

fairly summarize the demographic evidence. Even if these arguments had any legitimate basis, plaintiffs' highly detailed, case-specific quarrel over the weight of the evidence hardly presents the type of issue that is appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1987

In the Supreme Court of the United States

ROBERT VALDESPINO, ET AL., PETITIONERS

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a racial or language minority plaintiff challenging an at-large voting system under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may not make out a claim of vote dilution unless the plaintiff can show that the minority could constitute a majority in a single-member district.

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Statute:

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... *passim*
§ 2(a), 42 U.S.C. 1973(a) 7, 16-17
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In the Supreme Court of the United States

No. 98-1747

ROBERT VALDESPINO, ET AL., PETITIONERS

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. This case is a challenge under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to the system used to elect the Board of Trustees of the Alamo Heights (Texas) Independent School District (AHISD). The seven members of the Board of Trustees of AHISD are all elected from the entire school district at-large, by place, by majority vote, and for staggered terms;

single-shot voting is not permitted. AHISD uses only one polling place for all elections. See Pet. 2.

Petitioners, Hispanic residents and citizens eligible to vote in AHISD elections, alleged that AHISD's election system dilutes the voting strength of Hispanics in violation of Section 2. At trial, petitioners presented several versions of a "demonstration district" (District 1), designed to show that a single-member district could be drawn in AHISD that would permit Hispanics to elect representatives of their choice, in compliance with Section 2. According to demographic information drawn from the 1990 decennial census, Hispanics would constitute a majority of the voting age population (VAP) and a majority of the citizen voting age population (CVAP) in each of the demonstration districts presented by petitioners. Pet. App. 24a.

Petitioners also submitted evidence to the effect that Hispanic voters in a comparison single-member district, District 3 of the North East Independent School District (NEISD), had successfully elected a representative of their choice. District 3 of NEISD borders directly on petitioners' proposed District 1, see 9/18/97 Tr. 639-640, and according to evidence at trial, the Hispanic population of NEISD District 3 and petitioners' proposed District 1 actually constitutes one Hispanic community, albeit split between the two school districts, see 9/16/97 Tr. 403; 9/18/97 Tr. 448. Elections in NEISD were originally held at-large, but after a Section 2 suit was brought by minority residents, NEISD was divided into single-member districts. See Pet. Exh. 59. Hispanics make up only 47% of the CVAP of NEISD District 3, but a Hispanic representative has been elected from that district. 9/18/97 Tr. 636, 639-640.

Respondents maintained at trial that, because of demographic changes since the 1990 census, the census

data did not accurately reflect the makeup of the population of AHISD as of 1997, and that the district court should rely instead on a report prepared by respondents' expert demographer, Bill Rives. The Rives report concluded that, since the 1990 census, the total population of AHISD had increased, but that both the total population and the Hispanic CVAP in petitioners' demonstration districts had decreased. See Pet. App. 25a. The Rives report further indicated that, in light of those demographic changes, petitioners' demonstration districts either deviated from the ideal population of a single-member district in AHISD by more than 10%, or no longer contained a Hispanic majority CVAP. See *id.* at 26a. For those conclusions, Rives relied on the fact that an apartment complex heavily tenanted by Hispanics at the time of the 1990 census had been closed, renovated, and replaced by a different complex with a lower occupancy rate and a smaller percentage of Hispanic tenants. See *id.* at 5a, 31a. Rives also relied on 1990 census data (which he assumed to be still accurate) showing that 89% of the voting-age Hispanics in the demonstration district are citizens eligible to vote. See Pet. Exh. 63, at 8-9 & Exh. 3; Pet. App. 24a.

The district court ruled that respondents had established that 1990 census data do not accurately reflect current demographics within AHISD, Pet. App. 25a, and that the Rives report "is thoroughly documented, has a high degree of accuracy, and is clear, cogent, and convincing," *id.* at 27a-28a. The district court also found that the Rives report's "numbers reflect the demographic reality of Alamo Heights." *Id.* at 26a. The district court therefore decided to use the "adjustments made by the [Rives] Report to the 1990 Census figures." *Id.* at 28a.

Based on the Rives report, the district court held that petitioners had failed as a matter of law to establish a violation of Section 2. The court noted (Pet. App. 20a-21a) that, in *Thornburg* v. *Gingles*, 478 U.S. 30, 47-48 (1986), this Court stated that plaintiffs in a Section 2 vote-dilution case must make three showings, including, "[f]irst that the group is sufficiently large and geographically compact to constitute a majority in a single-member district." With regard to that "first *Gingles* factor," the district court also stated that "it is the burden of the [petitioners] to establish that it is possible to create a districting plan such that at least one district has a majority of minority voting age citizens." Pet. App. 21a. But according to the Rives report, two of the demonstration districts proposed by petitioners "contain[] insufficient population" to meet the constitutional requirement of equal apportionment, and the other demonstration district "does not contain a majority of Hispanics among [the] citizen-age [*sic*] voting population." *Id.* at 28a. Therefore, the court held, petitioners "have not established by a preponderance of the evidence that they can draw a district that satisfies the first requirement of *Gingles*," and "their claim under Section 2 of the Voting Rights Act must fail." *Ibid.*

2. The court of appeals affirmed. Pet. App. 1a-18a. The court stressed that it "has interpreted the *Gingles* factors as a bright line test" and that "failure to establish any one of these threshold requirements is fatal" to a Section 2 claim. *Id.* at 8a. In addition, with respect to the first *Gingles* factor, the court stated (*id.* at 9a) that it "has required vote dilution claimants to prove that their minority group exceeds 50% of the relevant population in the demonstration district," and observed that, in *Gingles*, this Court referred to a

requirement that Section 2 plaintiffs demonstrate "a majority" (*ibid.*). The court accordingly rejected petitioners' argument that, to establish that a particular election system deprives minority voters of the opportunity to elect representatives of their choice, minority voters should be able to show that they would be able to elect such representatives in a single-member district under a different system, even if they would not actually constitute a majority of the CVAP in that district: "[Petitioners] still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district." *Ibid.* The court also made clear that "the relevant population" consists of the *citizens* of voting age in the demonstration district (*id.* at 9a-10a). Thus, according to the court of appeals, as an absolute precondition to making out a Section 2 violation, minority plaintiffs must show that they would constitute a majority of the CVAP in a single-member district.

The court of appeals also upheld the district court's decision to rely on demographic information in the Rives report rather than the 1990 census. Pet. App. 10a-12a. The court rejected petitioners' contentions that the Rives report was flawed and based on incorrect assumptions, stating that petitioners' "challenges are generally misdirected" (*id.* at 11a). The court ruled that, whatever the report's possible errors, its conclusion that petitioners could not identify a majority-minority district of Hispanic voting age citizens remained valid (*ibid.*).

DISCUSSION

The court of appeals ruled in this case that, as an absolute precondition to establishing a violation of Section 2 of the Voting Rights Act, a minority plaintiff making a vote dilution challenge to an at-large election system must show that the minority could constitute a majority of the citizen voting age population in a single-member district. The court of appeals concluded that that threshold showing is required by this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). In our view, Section 2 and *Gingles* do not impose an absolute requirement that a minority be shown to constitute a majority in a single-member district. Rather, because a Section 2 plaintiff must show that the challenged system impairs the minority community's ability to elect representatives of its choice, such a plaintiff may rely on evidence showing that, under a different election system, the minority community would be able to elect representatives of its choice, even if it would not constitute an absolute majority of the population (by any particular measure) in a single-member district.[1] The court of appeals' contrary decision is therefore incorrect. Further, because that decision raises issues of recurring significance in the administration and enforcement of Section 2--issues that will be of particular importance in the next round of redistricting following the upcoming decennial census--this Court should grant review to determine whether Section 2

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[1] The United States has taken that position in Section 2 litigation in the lower courts. See U.S. Amicus Br. at 12-17, *Campos* v. *City of Houston*, 113 F.3d 544 (5th Cir. 1997); U.S. Br. at 52-56, *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

imposes the absolute 50% rule applied by the lower courts in this case.

Depending on how the Court answers that question, it may be necessary for the Court to consider as well another aspect of the court of appeals' decision—namely, that to satisfy the first threshold requirement of *Gingles*, a vote dilution plaintiff must show that the minority would constitute the majority of the citizen voting age population (CVAP), rather than the voting age population (VAP), of a single-member district. If the Court agrees with our submission that a vote dilution claim does not require that the minority constitute an absolute numerical majority of a single-member district, then the difference between CVAP and VAP may have no significance in this particular case. But if the Court concludes that an absolute numerical majority is required, then it may be necessary to decide whether that majority must be determined by reference to the single-member district's CVAP, or whether there are circumstances in which the parties' evidence of the CVAP of a proposed demonstration district, even if drawn from census data, may not accurately reflect a minority's potential to elect a representative of its choice from that district. One such possible concern may arise in this case from the district court's reliance on changes in the actual population of petitioners' demonstration district after the 1990 census while also using unadjusted data about the citizenship ratio of Hispanics from the 1990 census.

1. Section 2(a) of the Voting Rights Act of 1965, 42 U.S.C. 1973(a), provides that no voting practice may be enforced "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. Under Section 2(b)

of the Act, a violation is established "if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] class of citizens * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

The text of Section 2 does not itself require that a member of a minority group claiming a violation such as vote dilution establish that the minority could constitute a majority in a single-member district. In *Gingles* and later cases, however, this Court established a framework for determining whether a challenged electoral practice (there, multimember districts) results in vote dilution in violation of Section 2. Stressing that "[m]inority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates," 478 U.S. at 48, the Court in *Gingles* identified three "necessary preconditions" (*id.* at 50) for a showing that multimember districts operate in such a way:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politi-

> cally cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Id. at 50-51 (citations, footnotes, and emphasis omitted). If those preconditions are met, the court must then determine whether, under the "totality of circumstances," the minority group has been denied an equal opportunity to participate in the political processes and to elect candidates of their choice. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 (1994).

Although the Court in *Gingles* stated that vote dilution plaintiffs must show that the minority would constitute "a majority in a single-member district," 478 U.S. at 50, that statement must be understood in its context, namely, as explaining how vote dilution plaintiffs could claim to be injured by a multimember districting system. As the Court explained, "[t]he reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. Thus, the Court's

focus in *Gingles* was on the minority group's potential to elect representatives of its choice in the context of racially polarized and bloc voting. Where a white majority usually votes to defeat the preferred representative of the minority community, a majority-minority district would give the minority at least the potential to elect the representative of its choice.

The Court did not state in *Gingles*, however, that minority voters could have the potential to elect representatives of their choice *only* when they constitute the majority of an election district. This Court has not decided whether or how the *Gingles* analysis, or some variation on that framework, should be applied in cases in which the minority population would constitute slightly less than 50% of a single-member district, but minority voters nonetheless would have the potential to elect representatives of their choice with the assistance of limited crossover voting from the majority or other racial or language minorities, and minority plaintiffs can prove that that potential to elect is diluted by an election system. In fact, the Court has noted on several occasions that it has reserved that question. See *Gingles*, 478 U.S. at 46 n.12; *id.* at 89 n.1 (O'Connor, J., concurring in the judgment); see also *De Grandy*, 512 U.S. at 1008-1009; *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993); *Growe* v. *Emison*, 507 U.S. 25, 41 n.5 (1993).[2]

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[2] The Court has occasionally referred to such a claim as alleging a dilution of the minority's potential to "influence" elections. See, *e.g.*, *Gingles*, 478 U.S. at 47 n.12; see also *De Grandy*, 512 U.S. at 1009 ("influence district"); *Voinovich*, 507 U.S. at 154 (same). Lower courts, however, have not used that term with a consistent meaning, and the term is best avoided in a case like this, where the claim is that, although racially polarized bloc voting does exist, a minimal amount of crossover voting (or other fact patterns such as a disproportionately large turnout by the minority) would

In our view, the flat 50% rule applied by the court of appeals is inappropriate, for a variety of circumstances may give a minority voting population that is compact, politically cohesive, and substantial in size yet just short of a majority the potential to elect a representative of its choice. Most importantly, even if voting in a particular jurisdiction is generally polarized by race, nonetheless there may be a small amount of consistent crossover voting from the majority (or from a different racial or language minority in the district) that would give the minority voters the potential to elect their representative of choice. Indeed, a rule invariably requiring that minority voters be able to make up the majority in a single-member district could only be justified on the assumption that a Section 2 claim also requires that voting be *totally* polarized by race, *i.e.*, that no white voter will ever vote for the candidate preferred by the minority. But in our experience, that is almost never the case; although racially polarized voting does in some places reach extreme degrees, it is rarely if ever total. And indeed, in *Gingles*, the Court observed that, "in general, a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover'*

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enable minority voters to elect representatives of their choice. That fact pattern must be distinguished from one in which racial or language minority voters would constitute substantially less than a majority in a single-member district, but through coalition politics would have the opportunity to influence the election of a representative, although not necessarily elect the representatives of their own choice. See, *e.g.*, *Uno* v. *City of Holyoke*, 72 F.3d 973, 990-991 (1st Cir. 1995) (using "influence district" to refer to district with approximately 28% minority voters who could affect the selection of candidates, but not elect their candidate of choice).

votes rises to the level of legally significant white bloc voting." 478 U.S. at 56 (emphasis added).[3]

The 50% rule applied by the court of appeals is also difficult to square with this Court's admonition that the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim." *De Grandy*, 512 U.S. at 1007; *Voinovich*, 507 U.S. at 158; see also *Gingles*, 478 U.S. at 45 (Section 2 requires a "searching practical evaluation of the past and present reality" based on "a functional view of the political process") (internal quotation marks omitted); *White* v. *Regester*,

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[3] At some point, of course, the amount of crossover voting may be sufficiently substantial that it would not be possible to sustain a finding that voting is racially polarized or that the majority votes as a bloc to defeat the candidate preferred by minority voters. Lower courts reviewing Section 2 claims have generally concluded, however, that a small but consistent amount of crossover voting does not defeat a finding of racially polarized or bloc voting. See, *e.g.*, *Sanchez* v. *Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996) (observing that *Gingles* "doesn't require an absolute monolith in the Anglo or Hispanic bloc vote and recognizes the existence and role of white crossover voting"), cert. denied, 520 U.S. 1229 (1997); *Teague* v. *Attala County*, 92 F.3d 283, 289 (5th Cir. 1996) (finding bloc voting even though 15% of whites had voted for black candidate), cert. denied, 522 U.S. 807 (1997); *NAACP* v. *City of Niagara Falls*, 65 F.3d 1002, 1009-1010 (2d Cir. 1995) (finding bloc voting even though 9-26% of whites had voted for black candidates); *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1242 (4th Cir. 1989) (bloc voting even though black candidate had received 14% of white vote), cert. denied, 498 U.S. 938 (1990). Moreover, the lower courts have accumulated considerable experience in making judgments about racially polarized and bloc voting and are able to distinguish between fact patterns in which racially polarized, bloc voting exists and those in which it does not exist. Thus, there is no danger that permitting minority voters to pass the first *Gingles* threshold even if they could not constitute 50% of the population of a single-member district will undermine *Gingles*' other requirement of bloc voting.

412 U.S. 755, 769-770 (1973) ("blend of history and an intensely local appraisal of the design and impact of [an electoral system] in the light of past and present reality, political and otherwise"). The other *Gingles* preconditions to establishing a vote dilution claim—the requirements that a minority population be compact, that the minority be politically cohesive, and that the white majority usually vote as a bloc to defeat the minority's candidate (see 478 U.S. at 50-51)—do not lend themselves to strict numerical cutoffs but rather require the application of judgment to the facts of each case, informed by evidence about voting patterns in the jurisdiction at issue.[4] There is no reason why a similar approach cannot be followed with respect to the requirement that a minority population be sufficiently substantial in size to have the potential to elect a representative.

Accordingly, the lower courts should not have dismissed petitioners' Section 2 claim based on a finding that Hispanics could constitute only 48% of the CVAP of petitioners' single-member district that satisfied the equal apportionment requirement, but should have considered more generally whether Hispanics in that proposed single-member district could have the potential to elect a representative. In making that judgment, the court should have considered petitioners' evidence that, in a similar neighboring district where Hispanics make up slightly less than a majority of the CVAP of the district, Hispanic voters had succeeded in

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[4] See, *e.g.*, *Clark* v. *Calhoun County*, 21 F.3d 92, 95 (5th Cir. 1994) (observing that "[t]he first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the black population be sufficiently compact to constitute a majority in a single-member district"); see also cases cited note 3, *supra* (addressing showing necessary to establish bloc voting).

electing their candidate of choice. Election results from a closely similar neighboring jurisdiction or another existing jurisdiction within the boundaries of the plaintiffs' proposed district are relevant to determining whether minority voters in a proposed district could have the potential to elect their candidates of choice.

The application of the 50% rule by the court of appeals, moreover, raises a recurring issue of considerable importance to the administration of Section 2. The question whether Section 2 plaintiffs claiming vote dilution must invariably show that the minority would constitute a majority of a single-member district has been raised, and continues to be raised, in numerous cases and should be definitively resolved by this Court.[5] It is particularly important, moreover, that the question be resolved before the round of redistricting following the next decennial census, so that jurisdictions

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[5] In addition to the decision below and *Perez* v. *Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999), petition for cert. pending, No. 98-1747, see *Negron* v. *City of Miami Beach*, 113 F.3d 1563, 1567-1568 (11th Cir. 1997) (holding that Hispanics could not make out Section 2 claim because they could not constitute majority of CVAP in single-member district); *Romero* v. *City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) (stating that "a section 2 claim will fail unless the plaintiff can establish that the minority group constitutes an effective voting majority in a single-member district"; affirming district court dismissal on Section 2 claim because blacks and Hispanics had not made that showing); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 942-945 (7th Cir. 1988) (rejecting Section 2 claim brought by black voters to at-large voting system because "[b]lacks comprising less than a majority in a district would not necessarily have the requisite potential to elect their candidates of choice"), cert. denied, 490 U.S. 1031 (1989); cf. *Sanchez*, 97 F.3d at 1314-1315 (finding Section 2 violation and potential for "majority-Hispanic district" as remedy where pre-existing district had 48.82% Hispanic population).

understand the extent of their obligations under Section 2.

2. It may also be necessary to decide in this case whether the court of appeals erred in ruling that petitioners' ability to draw a single-member district from which a representative of the Hispanic community could be elected must be evaluated only with respect to the CVAP of such a district. That issue is of particular importance with respect to vote dilution claims made by certain language minorities, such as Hispanics, in those circumstances where there is reason to believe that there is a significant disparity between the citizenship rates of the VAP of that minority and that of other ethnic groups, including the majority, in the demonstration district. This Court has not decided whether there is only one appropriate population to assess all vote dilution claims, *i.e.*, whether a court must assess dilution based on the minority's proportion of the general population, VAP, CVAP, or some other measure of population. See *De Grandy*, 512 U.S. at 1008-1009.[6]

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[6] There appears to be some difference of views between the Fifth and Eleventh Circuits as to whether CVAP must always be used to evaluate vote dilution claims. In this case, the Fifth Circuit appears to have ruled that CVAP data must always be used for vote dilution analysis. Pet. App. 10a. The Eleventh Circuit, however, has only required use of citizenship percentages (in conjunction with VAP data) when there is "reliable information indicating a significant difference in citizenship rates between the majority and minority populations." *Negron*, 113 F.3d at 1569 (approximately 88% v. 50% citizenship rates for non-Hispanic and Hispanic residents, respectively). "[S]uch a disparity is unlikely except in areas where the population includes a substantial number of immigrants." *Ibid.*; cf. *Barnett* v. *City of Chicago*, 141 F.3d 699, 704-705 (7th Cir.) (CVAP data appropriate to evaluate proportionality in Section 2 challenge to single-member district, parti-

That issue will be significant in this case if this Court rules, contrary to our submission, that a vote dilution claim necessarily depends on a showing that a racial or language minority could constitute an absolute numerical majority in a single-member district. If this Court were to agree with the court of appeals on that point, then the question would necessarily arise as to how plaintiffs may show that the minority could constitute the "majority"—*i.e.*, whether the minority must make up the majority of the total population, VAP, or CVAP of such a district.[7]

As a general matter, we agree with one premise of the court of appeals' decision, namely, that it is the right of citizens to vote that is pertinent to the concept of vote dilution under Section 2. Section 2(a) prohibits any practice that results in the denial or abridgment of

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cularly when noncitizens are a significant part of the population in issue), cert. denied, 118 S. Ct. 2372 (1998).

[7] That question is less likely to be significant in this particular case if this Court holds that a Section 2 vote dilution claim does not require the minority to be an absolute numerical majority in a single-member district. Petitioners have shown that Hispanics would be very close to a majority of the CVAP of their demonstration district, and have also submitted evidence to show that Hispanics in a comparison district with a similar Hispanic percentage of CVAP have elected a representative of their choice. Even if the Court agrees with us that the court of appeals' 50% rule is unwarranted, however, the question whether a court hearing a Section 2 vote dilution claim should look to CVAP or VAP may nonetheless have significance in some cases. To establish a vote dilution claim, the plaintiff must show that the minority would be "sufficiently large" in a single-member district. *Gingles*, 478 U.S. at 50. At some point the minority population may simply be too small in any single-member district to elect its representative of choice, and the question whether a court should look to CVAP or VAP to make that determination may be important in some cases.

"the right of any citizen of the United States" to vote on account of race or language-minority status. 42 U.S.C. 1973(a). Section 2(b) further provides that a violation of Section 2(a) is established if the political process is not equally open to participation "by members of a class of citizens" constituting a racial or language minority. 42 U.S.C. 1973(b).

There are, however, some significant practical difficulties with a rule that would require courts in all circumstances to rely on CVAP data from the census to determine whether a minority group could elect a representative of its choice from a single-member district. In the first place, as petitioners have pointed out (Pet. 6), citizenship data from the decennial census necessary to determine the CVAP of a demonstration district is generally not available until after most postcensus redistricting is completed.[8] Thus, a requirement that vote dilution always be evaluated by reference to CVAP could make it difficult, and perhaps impossible, for certain minority groups, including Hispanics, to show that a newly adopted redistricting plan would result in dilution of their vote until at least one election under the assertedly dilutive, and therefore illegal, plan had taken place. In addition, as petitioners have also pointed out (Pet. 7), CVAP census information is less refined than VAP census information, because the CVAP is drawn from census block group data whereas VAP is drawn from the more detailed census block data. In some cases, therefore, CVAP census data may mask the possibility that members of the minority

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[8] Citizenship rates are drawn, not from the short-form census questionnaires distributed to every household, but from data taken from the long-form questionnaires distributed to a statistical sample of the population. See 9/16/97 Tr. 258.

group who are citizens are concentrated in one part of the census block group. That information, if it were available, might show that it would be possible to draw a demonstration district in which the minority constituted a majority of the CVAP.

This case presents an additional concern about a rule requiring exclusive reliance on CVAP to determine whether petitioners could draw a single-member district as a remedy for a Section 2 violation. As noted above (pp. 2-3, *supra*), the district court relied on changes in population in petitioners' demostration district between 1990 and 1997, as reported by respondents' expert demographer, to justify setting aside the census results. Respondents' demographer and the district court assumed, however, that the 89% citizenship figure for Hispanics in the demonstration district, drawn from the 1990 census, remained valid. See Pet. Exh. 63, at 8-9 & Exh. 3; Pet. App. 24a. Respondents and the district court therefore appear to have overlooked the possibility that the citizenship rate of Hispanics of voting age in that district might have increased since 1990. Thus, the figures for the CVAP of petitioners' demonstration district may have been understated, and in single-member districts as small as those involved in this case, even a very small error in the citizenship rate might have improperly prevented petitioners from establishing that Hispanics consituted the majority of the CVAP of their demonstration district. This case may therefore present a circumstance in which the CVAP data used by the district court did not give the court a fully accurate understanding of whether it is possible to draw a single-member district in which a minority could elect a representative of its choice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 98-1987

In The

Supreme Court of the United States

ROBERT VALDESPINO; BRENDA ROLON,

Petitioners,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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RESPONDENTS' SUPPLEMENTAL BRIEF

The amicus curiae brief of the United States suggests several reasons for this Court to grant certiorari in *Valdespino v. Alamo Heights Independent School District*. The record in this case, however, is not sufficiently developed to permit this Court's meaningful review and resolution of the issues highlighted by the United States.

I.

The Record in *Valdespino* Is Not Fully Developed on the Issue the United States Asks the Court to Address

The United States urges the Court to revisit the test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to determine whether *Gingles* imposes an absolute requirement that a minority demonstrate its ability to constitute a majority in a single-member district as a prerequisite to bringing a dilution claim under section 2 of the Voting Rights Act. The problem is, the petitioners in *Valdespino* did not try their case, or develop a record, on the theory that they could successfully elect the candidate of their choosing notwithstanding their failure to constitute a majority in a putative single-member district.[1]

Instead, petitioners argued that they *could* demonstrate the existence of a majority. The district court

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[1] Plaintiffs argued that they would have the ability to elect a representative of their choice in what they contended was a Hispanic majority district; they never specifically addressed whether they had the ability to elect a representative of their choice in a *non-majority* Hispanic district. Such a hypothetical claim would seemingly require evidence of expected cross-over votes from non-Hispanics – something plaintiffs never offered.

rejected their population numbers and adopted those of Alamo Heights Independent School District, which demonstrated that plaintiffs could *not* comprise a majority in a putative single-member district.

The United States correctly observes that the record contains evidence that "in a similar neighboring district where Hispanics make up slightly less than a majority of the CVAP of the district, Hispanic voters had succeeded in electing their candidate of choice." Br. of the United States at 15. The United States contends that the district court erred in not considering this evidence. *Id.* The problem is that this theory was never truly developed or tried in this case. In fact, the evidence cited by the United States encompasses virtually all of the evidence in the record pertaining to this issue. The record is so sparse that it does not even reveal whether the election in the neighboring district was contested. *Valdespino* lacks any meaningful record on the issue the United States urges this Court to decide.

II.

This At-Large Case Does Not Present the Legal Issue that Will Arise in the Wake of Redistricting Following the 2000 Census

Valdespino also is an inappropriate vehicle for lending guidance to the lower courts on the redistricting issues that inevitably will arise following the 2000 census. *See* Br. of the United States at 14-15 (inviting the Court to resolve section 2 issues prior to the redistricting to follow the next decennial census). *Valdespino* involves a challenge to an at-large system. The cases that will arise in

the wake of the 2000 census will involve challenges to the redrawing of district lines in light of population changes. Redistricting is a distinct issue from the at-large challenge presented in *Valdespino*. As this Court has noted, the *Gingles* analysis may need to be modified when it is used in the context of at-large challenges as opposed to redistricting challenges. *See Johnson v. DeGrandy*, 512 U.S. 997, 1007, 1013 (1994). Consequently, *Valdespino*, an at-large case, is an ill-suited vehicle for advising lower courts on the proper application of *Gingles* in the post-2000 census, redistricting context.

III.

The Practical Issue the United States Raises Regarding Citizen-Voting-Age Population Percentages Was Not Controverted in this Case

Finally, this case does not present the citizen-voting-age population (CVAP) issue the United States urges this Court to address. *See* Br. of the United States at 18 (suggesting potential impropriety of using 1990 CVAP percentage with adjusted population numbers for 1997). The plaintiffs in *Valdespino* testified to the same CVAP percentage presented by Alamo Heights' expert demographer – undoubtedly because it was more favorable to them than the CVAP percentage originally proposed by their own witness. *See* Tr. 375, Def. Ex. 24 at 3-5 and Ex. 3; Pl. Ex. 1-b. There was no controversy between the parties over the proper CVAP percentage.

The United States appears to endorse both the Fifth Circuit's and the respondents' view that as a matter of law section 2 protects the right of "citizens" to vote. *See*

id. at 16-17. However, the United States argues that as a *practical* matter, as opposed to a legal matter, use of CVAP data may disadvantage minority groups whose citizenship percentage may have improved since the last census. *See id.* at 17. Again, that practical issue is not presented in *Valdespino*, where all parties agreed on the proper CVAP percentage to apply.

CONCLUSION

Should the Court wish to revisit *Gingles* to advise lower courts on the proper standard to apply to the redistricting cases that inevitably will arise in the wake of the 2000 census, this Court may wish to focus its efforts on a case that actually involves redistricting, as opposed to an at-large challenge. Similarly, should the Court wish to revisit the *Gingles* test to determine the availability of an ability-to-elect claim in circumstances where a minority cannot comprise a majority within a putative district, the Court may wish to turn its sights on a case in which the evidentiary record was developed in furtherance of that type of claim. The United States has highlighted several policy concerns over proper application of the

Gingles test, but the record in *Valdespino* renders it an ill-suited vehicle for resolving these issues.

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PETITIONERS' SUPPLEMENTAL BRIEF

The Respondents have filed a supplemental brief in response to the amicus curiae brief of the United States in which they make the assertion that the record of this case is not sufficiently developed to permit the Court meaningful review and resolution of the issues highlighted by the United States. The Respondents' objections, however, do not accurately reflect the record in this case.

I. The Record in *Valdespino* Was Fully Developed on the Issue the United States Asks the Court to Address.

The United States has urged that the petition for certiorari be granted so that this Court may resolve definitively the question of whether Section 2 plaintiffs claiming vote dilution must invariably show that they constitute a majority of the citizen voting age population of a single member district. The Respondents contend that this issue was not presented or developed below, and therefore, does not merit this Court's review. The Respondents are wrong.

Rule 10 of the Supreme Court Rules specifically identifies some, but not all, situations in which the United States Supreme Court may, in its discretion, accept certiorari. A ruling by a court of appeals addressing an issue that merits this Court's review may provide sufficient grounds for a grant of certiorari. *Id.* The United States Court of Appeals for the Fifth Circuit was presented with the issue of whether Section 2 imposes an absolute requirement that a minority demonstrate its ability to constitute a majority in a single member district as a prerequisite to bringing a vote dilution claim under Section 2. (Appellants' Brief, p. ix, Statement of

Issues, Issue 2: Whether the so-called *Gingles I* requirement is a "bright-line" test that may only be met by producing a majority minority citizen voting age population single member district?; Appellants' Brief, pp. 5, 7-11, "[T]he District court failed to evaluate the evidence to determine whether the plans submitted by the Plaintiffs established that, absent the at-large election system, Plaintiffs would have an equal opportunity to elect candidates of their choice."; Reply Brief for Appellants, pp. 1-7.) Moreover, the Fifth Circuit adopted a "bright-line" test that may only be met by showing that minority plaintiffs exceed 50% of the citizen voting age population of a single member district to satisfy their burden under *Gingles I*. (Appendix 9a-10a). Clearly, the issue was properly presented and ruled upon by the United States Court of Appeals.

The issue was also presented at the trial.[1]

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[1] The Respondents also assert that no evidence of cross-over voting by the majority Anglo voters was ever presented. (Respondents' Supplemental Brief, p.1, n.1) This is also wrong. Petitioners submitted an election analysis by their expert, Dr. Robert Brischetto. In his analysis of racially polarized voting, Dr. Brischetto provided estimates of support for the Hispanic preferred candidates from the Hispanic community, **the non-Hispanic community,** and from the Alamo Heights I. S. D. at-large. (Plaintiffs' Exhibit No. 44; Record Volume 4, Trial Transcript Vol. I, pp. 190-214). In his ecological correlation and regression analysis, Dr. Brischetto looked at almost forty elections over a ten year period. *Id.* This evidence showed a range of support for the Hispanic preferred candidate **from the non-Hispanic community** of: between 6% and 27% in 1986; between11% and 39% in 1988; between 18% and 58% in 1990; between 12% and 31% in 1992; between 14% and 44% in 1994; and between 15% and 26% in 1996. *Id.* Moreover, these rates of cross-over voting were taken into account when Petitioners' expert testified that the putative district provided Hispanics an opportunity to elect candidates of their choice. (Record Vol. 6, Trial Transcript Vol. III, pp. 462-464) Therefore, Plaintiffs indeed submitted evidence showing the degree of

Respondents' assertions their putative *Gingles* districts to determine whether they provided a viable opportunity for the Hispanic voters of the Alamo Heights Independent School District to elect candidates of their choice, and urged that no "bright line" test be applied in reviewing the evidence on the *Gingles I* issue. (Record Volume 5, Trial Transcript Vol. II, pp. 386- 388; Record Volume 7, Trial Transcript Vol. IV, pp. 762-764, Plaintiffs' closing argument: "The question is whether the plaintiffs have produced a district in which the minority community has a viable opportunity to elect a candidate of its choice.")

Finally, Respondents urge that certiorari be denied because the record is sparse on this issue. To the contrary, the record is substantial and certainly sufficient to address the issue and determine that Hispanics would have an opportunity to elect candidates of their choice in the single member districts submitted by the Petitioners in this case. As has been argued by both the Petitioner and the United States, this case presents significant issues which merit review by this Court.

II. The *Gingles I* Threshold Requirement Applies Equally to Both Single Member and At-Large Election Systems.

The Respondents next argue that certiorari should be denied because a ruling here will not provide guidance to the redistricting issues that will surface with the publication of the 2000 census. (Respondents' Supplemental Brief, p. 2-3) The Respondents argue that since this case involves an at-

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cross-over support enjoyed by the Hispanic preferred candidate and of its impact on the viability of the putative district.

large challenge and redistricting will involve single member districts, this case is "ill-suited" for advising lower courts on the proper application of the *Gingles* standards. Yet, this Court has held that the *Gingles* factors, including the geographic insularity factor, apply in challenges to single member as well as multimember districts. *Growe v. Emison*, 507 U. S. 25, 40-41 (1993). Consequently, a determination of the issue in *Valdespino* will provide guidance to lower courts and legislatures on the proper application of *Gingles* in the post-2000 census redistricting.

III. The Appropriate Use of Citizen Voting Age Population In Measuring *Gingles I* Compliance Was Controverted in this Case

The Respondents' final argument is that since the Plaintiffs used the same citizen voting age population (CVAP) numbers to support their claims as the Defendants, the parties are now foreclosed from challenging the use of CVAP as the ultimate benchmark to determine compliance with the *Gingles I* precondition. Petitioner in fact presented evidence of the deficiencies in the CVAP data. (Record Vol. 4, Trial Transcript Vol. I, pp. 225-227; Record Vol. 5, Trial Transcript, Vol. II, pp. 375-378) However, neither the Petitioner, nor the United States, argues for ignoring citizen voting age population altogether. Respondents' argument simply misconstrues the issue presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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